SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~754~~ 30

IDAHO SHEET METAL WORKS, INC.,
PETITIONER,

vs.

W. WILLARD WIRTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. A]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action File No. 3745

ARTHUR J. GOLDBERG, Secretary of Labor,
United States Department of Labor, Plaintiff,

v.

IDAHO SHEET METAL WORKS, INC.,
a Corporation, Defendant.

COMPLAINT—Filed February 12, 1962

I

Plaintiff brings this action to enjoin defendant from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

II

Jurisdiction of this action is conferred upon the Court by section 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Idaho, having a place of business located at Burley, Idaho, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the fabrication and installation of sheet metal items and general sheet metal work.

IV

At all times hereinafter mentioned defendant employed, and is employing, approximately 9 employees in and about its aforesaid place of business in the fabrication and installation of sheet metal items and general sheet metal work. Sheet metal items and work fabricated by the said [fol. B] employees is installed by them in the facilities of commercial and industrial customers of the defendant and used by said customers in the production of goods for interstate commerce, and the said employees have been, and are, therefore, engaged in the production of goods for interstate commerce within the meaning of the Act.

V

Defendant repeatedly has violated, and is violating, the provisions of sections 7 and 15(a)(2) of the Act by employing its employees engaged in the production of goods for interstate commerce, within the meaning of the Act as aforesaid, for workweeks longer than 40 hours without compensating these employees for their employment in excess of 40 hours in any workweek at rates not less than one and one-half times the regular rates at which they were employed.

VI

Since May, 1959, defendant repeatedly has violated the provisions of section 15(a)(2) of the Act in the manner hereinabove alleged and a judgment enjoining and restraining said violations is expressly authorized by section 17 of the Act;

Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining defendant, its agents, servants, employees, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of section 15(a)(2) of the Act.

Charles Donahue, Solicitor of Labor; Kenneth C. Robertson, Regional Attorney; H. A. Kelley, Attorney, Attorneys for Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, Plaintiff.

P. O. Address: Office of the Solicitor, United States Department of Labor, 1305 Third Avenue, Sixth Floor, Seattle 1, Washington, Tel. No.: MUtual 2-3300, Ext. 1181.

[File endorsement omitted]

[fol. C]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action File No. 3745

[Title omitted]

ANSWER—Filed March 6, 1962

Comes Now The Defendant in the above entitled action and in answer to Plaintiff's Complaint denies each and every allegation contained therein not hereinafter admitted, qualified or explained.

I.

Defendant admits Paragraph I but affirmatively alleges that the Fair Labor Standards Act of 1938, as amended, does not apply to the employer or its employees.

II.

Defendant admits that it is a corporation as referred to in Paragraph III of the Complaint and admits that it has a place of business in Burley, Idaho, but denies that it is

engaged solely in the business of fabrication and installation of sheet metal items and in connection therewith alleges that it is engaged as a retail service establishment selling and servicing to the public in general.

III.

With reference to Paragraph IV, the Defendant admits it employs approximately 9 employees in its place of business as heretofore alleged, and admits that its employees service and repair items fabricated or sold by Defendant and that some of its customers are commercial and industrial and produce goods for interstate commerce, but denies that said sales or services are in interstate commerce within the meaning of the Act.

[fol. D] IV.

Defendant denies Paragraph VI of the Complaint and the whole thereof, and by way of affirmative defense alleges that it is exempt from the provisions of the Act under Sections 13(a)(2) and 13(a)(4), and on the further grounds that neither Defendant nor its employees are engaged in the production of goods for interstate commerce and that they are therefore not engaged in interstate commerce as required by the Act.

Wherefore Defendant asks that the Plaintiff's cause of action be dismissed and that the Plaintiff take nothing by its Complaint.

Eli A. Weston, Attorney for Defendant, 711½ Bannock St., Boise, Idaho.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. E]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action File No. 3752

[Title omitted]

COMPLAINT—Filed March 9, 1962

I

Plaintiff, Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, brings this action to recover from the defendant Idaho Sheet Metal Works, Incorporated, a corporation, unpaid overtime compensation due its former employee, William D. Combs, under the provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

II

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Idaho, having a place of business located at Burley, Idaho, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the fabrication and installation of sheet metal items and general sheet metal work.

III

(a) Jurisdiction of this action is conferred upon the Court by Section 16(c) of the Act and by the Judicial Code, 28 U.S.C. 1337 and 1345.

(b) By the provisions of Reorganization Plan No. 6 of 1950 (15 F R. 3174, 64 Stat. 1263), issued under the Reor-

[fol. F] ganization Act of 1949, 5 U.S.C., 133z to 133z-15, the functions of the Administrator of the Wage and Hour Divisions, United States Department of Labor, under the Act, were transferred to the Secretary of Labor.

IV

For his cause of action herein plaintiff alleges that:

(a) William D. Combs has filed with the plaintiff a written request to bring this action, claiming unpaid overtime compensation from the defendant.

(b) Defendant employed William D. Combs at its aforesaid place of business as a sheet metal worker during each workweek between March 6, 1960 and December 17, 1960. Throughout the period of his employment, as aforesaid, said employee regularly and customarily was engaged in the fabrication and installation of sheet metal items and general sheet metal work which was fabricated for and installed in the facilities of commercial and industrial customers of the defendant and used by said customers in the production of goods for interstate commerce. At all times mentioned herein, the said William D. Combs was engaged in the production of goods for interstate commerce within the meaning of the Act.

(c) During many workweeks within the aforesaid period, defendant employed the said William D. Combs in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for workweeks longer than 40 hours, and failed and refused to compensate him for such employment in excess of 40 hours in such workweeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to section 7 of the Act.

(d) As a result of said violations of section 7 of the Act by defendant there is due and owing from defendant the sum of $656.97, which amount has been demanded of the defendant and remains unpaid.

Wherefore, plaintiff demands judgment against the de-
[fol. G] fendant for $656.97, interest, and costs.

Charles Donahue, Solicitor of Labor; Kenneth C. Robertson, Regional Attorney; H. A. Kelley, Attorney, Attorneys for Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, Plaintiff.

P. O. Address: Office of the Solicitor, United States Department of Labor, 1305 Third Avenue, Sixth Floor, Seattle 1, Washington, Tel. No.: MUtual 2-3300, Ext. 1181.

[File endorsement omitted]

[fol. H]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil No. 3752

[Title omitted]

ANSWER—Filed April 23, 1962

Comes Now The Defendant in the above entitled action and in answer to Plaintiff's Complaint denies each and every allegation contained therein not hereinafter admitted, qualified or explained.

I.

Defendant admits that part of Paragraph I which alleges that the Secretary of Labor has instituted action to recover overtime compensation for Defendant former employee William D. Combs, but denies that such overtime compensation or any compensation is due said employee.

II.

As to Paragraph II, Defendant admits that it is a corporation organized under the laws of the State of Idaho with its place of business at Burley, Idaho, within the geographical jurisdiction of this Court, but denies that it is in the fabrication business but that on the contrary is a retail establishment as defined by the Act rendering services of a retail nature to the general public.

III.

Defendant admits the allegations of Paragraph III with reference to the sections of the Act and Judicial Code, but alleges in connection therewith that the Defendant is exempt as a retail service establishment under the Fair Labor Standards Act as amended.

[fol. I]

IV.

Defendant has no knowledge with reference to the allegation in Sub-paragraph (a) of Paragraph IV, and therefore neither admits nor denies the same. With reference to Sub-paragraph (b), Defendant admits that William D. Combs was employed by the Defendant during 1960 and that the dates alleged in said sub-paragraph are substantially correct, but Defendant denies that said employee was engaged in the production of goods for interstate commerce within the meaning of the Act, and on the contrary was engaged as an employee in a retail service establishment as defined by the Act and accepted by the industry. Defendant denies Sub-paragraphs (c) and (d) of Paragraph IV and denies that it owes the Plaintiff $656.97 or any other sum.

V.

In further answering the Plaintiff's Complaint, the Defendant alleges that Action No. 3745, filed on or about the

12th day of February, 1962, between the Plaintiff and the Defendant, is in the nature of a civil action and injunction seeking to restrain the Defendant from violating Sections 7 and 15(a)(2) of the Fair Labor Standards Act and that said action is now pending, and further that the Defendant has interposed an answer in said action claiming, among other things, exemption as a retail service establishment.

Wherefore Defendant asks that the Plaintiff's cause of action be dismissed and that the Defendant be allowed his costs and disbursements and such other and further relief as to the Court may seem just, fair and equitable.

Eli A. Weston, Attorney for Defendant, 711½ Bannock St., Boise, Idaho.

[fol. J] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. K]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

Civil Action No. 3745

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

v.

IDAHO SHEET METAL WORKS, INC., a Corporation, Defendant.

Civil Action No. 3752

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

v.

IDAHO SHEET METAL WORKS, INC., a Corporation, Defendant.

PRE-TRIAL ORDER—September 3, 1962

These causes having come on for pre-trial conference before the Honorable Fred M. Taylor, United States District Judge, plaintiff appearing by James B. Leist, one of his attorneys, and defendant appearing by Eli A. Weston, its attorney, now, pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 7-1 of the Rules of the United States District Court for the District of Idaho, the court makes the following Order reciting the action taken at the conference, the agreements made by the parties regarding the matters considered, and limiting the issues for trial to

those not disposed of by admissions or agreements of counsel:

1. *Nature of Actions*—Civil No. 3745 is an action by Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, to enjoin the defendant, Idaho Sheet [fol. L] Metal Works, Inc., a corporation, from violating the overtime provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*), hereinafter referred to as the Act.

Civil No. 3752 is an action by the Secretary to recover from the defendant unpaid overtime compensation allegedly due to its former employee William D. Combs under the provisions of the Act.

2. *Jurisdiction*—Jurisdiction in No. 3745 is conferred on this court by section 17 of the Act.

Jurisdiction in No. 3752 is conferred on this court by section 16(c) of the Act and by the Judicial Code, 29 U.S.C. 1337 and 1345.

3. *Amendments Allowed*—None.

4. *Actions Consolidated for Trial*—On the representation of plaintiff's attorney that the two actions involve common questions of fact and of law, and without objection by the defendant, Civil Action No. 3745 and Civil Action No. 3752 are hereby consolidated for trial.

5. *Admitted Facts*—The following facts are admitted and require no proof:

(a) Jurisdiction is conferred on this court by sections 17 and 16(c) of the Act and by the Judicial Code, 29 U.S.C. 1337 and 1345, as stated in paragraph 2.

(b) Defendant is and at all times hereinafter mentioned was an Idaho corporation, having an office and place of business in Burley, Idaho, within the jurisdiction of this court, and is and at all times hereinafter mentioned was engaged in Burley, Idaho, in the fabrication and sale of sheet metal products, to a lesser extent in the installation,

maintenance and repair of such products, and, to a small extent, in the sale of solder, sheet metal, water spouts, elbows and similar items.

[fol. M] (c) Defendant's total dollar volume of sales of goods or services (or both) in the years 1959, 1960, and 1961 was:

1959	$134,805.50
1960	309,546.75
1961	229,456.10

(d)(i) Defendant's total dollar volume of sales of goods or services (or both) to Shelley Processing Company, Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 90,301.75
1960	46,336.95
1961	60,407.35

(ii) Shelley Processing Company is a trade name of the Ruby Corporation, a wholly-owned corporate subsidiary of the J. R. Simplot Company. The Shelley Processing Company is and for many years has been engaged at its Burley plant in the processing of potatoes into various dehydrated potato products such as instant mashed potatoes, potato flour, potato flakes, and similar goods made from potatoes.

(iii) Substantially all of the dehydrated potato products referred to in subparagraph (d)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from the Shelley Processing Company's Burley plant to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, galvanized iron or other sheet metals) potato handling and processing equipment, such

as vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by the Shelley Processing Company in the processing of potatoes into the dehydrated potato products referred to in subparagraphs (d)(ii) and (d)(iii). In certain of the aforesaid workweeks some of defendant's employees also spent a substantial part of their total hours worked in maintaining or repairing such equipment.

[fol. N] (e)(i) Defendant's total dollar volume of sales of goods or services (or both) to the J. R. Simplot Company, Heyburn, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 8,559.35
1960	180,721.85
1961	92,079.77

(ii) The J. R. Simplot Company is and for many years has been engaged in the processing of potatoes into various potato products. In 1959 and 1960 this company built a new plant at Heyburn, Idaho, to supplement and increase its existing production facilities, including a plant at Caldwell, Idaho, where it was and is engaged in the processing of various frozen potato products, including french fried potatoes, hashed brown potatoes, and potato patties. The new Heyburn plant was completed in the summer of 1960 and commenced regular production in September 1960. Since the latter date the J. R. Simplot Company has been engaged at its Heyburn, Idaho, plant in the processing of various frozen potato products such as french fried potatoes, hashed brown potatoes, and potato patties.

(iii) Substantially all of the frozen potato products produced in the aforesaid J. R. Simplot plant at Heyburn, Idaho, have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered, and sold in interstate commerce from said plant to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, galvanized iron or other sheet metals) potato handling and processing equipment such as vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by the J. R. Simplot Company in the processing of potatoes into the frozen potato products referred to in subparagraph (e)(iii). In certain of the aforesaid workweeks some of defendant's employees also spent a substantial part of their total hours worked in maintaining or repairing such equipment.

[fol. 0] (f)(i) Defendant's total dollar volume of sales of goods or services (or both) to Idaho Potato Processors, Inc., Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 7,439.40
1960	15,907.86
1961	30,587.00

(ii) In 1957 Idaho Potato Processors, Inc., built a new plant at Burley, Idaho, to process potatoes into frozen potato products. Production was commenced in February 1958. Since that date Idaho Potato Processors, Inc., has been engaged at its Burley, Idaho, plant in the processing of potatoes into frozen potato products such as french fried potatoes, hashed brown potatoes, and potato patties.

(iii) Substantially all of the frozen potato products referred to in subparagraph (f)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered, and sold in interstate commerce from the aforesaid plant of the Idaho Potato Processors, Inc., at Burley, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless

steel, copper, aluminum, galvanized iron or other sheet metals) potato handling and processing equipment such as vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by Idaho Potato Processors, Inc., in the processing of potatoes into the frozen potato products referred to in subparagraphs (f)(ii) and (f)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(g)(i) Defendant's total dollar volume of sales of goods [fol. P] or services (or both) to Idaho Industries, Burley, Idaho, in the years 1960 and 1961 was:

1960	$13,103.59
1961	4,020.35

(ii) Idaho Industries, a corporation, was organized in 1958 for the purpose of constructing a potato processing plant at Burley, Idaho, for Ore-Ida Potato Products, Inc., Ontario, Oregon. Ore-Ida Foods, Inc., is and (under the name Ore-Ida Potato Products, Inc.) for many years has been engaged at its Ontario, Oregon, plant in processing potatoes into various potato products. The new plant at Burley was built in 1959 and 1960 to supplement and increase Ore-Ida's existing production facilities and to enable the company to process at their source potatoes previously transported from the Burley area to Ontario for processing. Production was commenced in September 1960. From that date until February 1961 Ore-Ida Potato Products, Inc., and since February 1961 Ore-Ida Foods, Inc., have been engaged at the Burley, Idaho, plant in question in the processing of potatoes into frozen potato products such as french fried potatoes, hashed brown potatoes, and "Tater Tots"—little balls of shredded potatoes.

(iii) Substantially all of the frozen potato products referred to in subparagraph (g)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, de-

livered, and sold in interstate commerce from the Burley, Idaho, plant referred to to points outside of the State of Idaho.

(iv) During many workweeks in the years 1960 and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, galvanized iron and other sheet metals) potato handling and processing equipment, such as vats, storage tanks, hoods, elevator buckets, chutes, tables, etc., which was sold to and used by Ore-Ida Potato Products, Inc., and Ore-Ida Foods, Inc., in the processing of potatoes into the frozen potato products referred to in subparagraphs (g)(ii) and (g)(iii). In certain of the aforesaid [fol. Q] workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(h)(i) Defendant's total dollar volume of sales of goods or services (or both) to The Great Atlantic & Pacific Tea Company (Produce Division), Burley, Idaho, in the years 1960 and 1961 was:

1960	$10,155.95
1961	3,414.00

(ii) Prior to 1960 The Great Atlantic & Pacific Tea Company (Produce Division) operated a fresh potato packing plant at Paul, Idaho. In 1960 the company built a plant at Burley, Idaho, to replace the fresh-pack facilities at Paul and extend the company's operations to the processing of frozen potato products. Paul is about three miles from Burley. Fresh-pack operations in the new plant started in October, 1960, and the production of frozen potato products commenced in December 1960. Since the latter date The Great Atlantic & Pacific Tea Company (Produce Division) has been engaged at its Burley, Idaho, plant in packing fresh potatoes and in the processing of potatoes into frozen potato products such as french fried potatoes, hashed brown potatoes, and potato patties.

(iii) Substantially all of the fresh potatoes and frozen potato products referred to in subparagraph (h)(ii) have been and are being produced for interstate commerce and have been and are being transported, shipped, delivered, and sold from the aforesaid plant of The Great Atlantic & Pacific Tea Company (Produce Division) at Burley, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1960 and 1961 defendant's employees spent a substantial part of their total hours worked fabricating (from stainless steel, copper, aluminum, galvanized iron and other sheet metals) potato handling and processing equipment, such as tables, vats, storage tanks, hoods, elevator buckets, chutes, etc., which was sold to and used by The Great Atlantic & Pacific Tea Company (Produce Division) in packing fresh potatoes and in the processing of potatoes into the frozen [fol. R] potato products referred to in subparagraphs (h)(ii) and (h)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(I)(i) Defendant's total dollar volume of sales of goods or services (or both) to Western Seed, Inc., Heyburn, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 313.50
1960	1,252.40
1961	861.80

(ii) Western Seed, Inc., is and since a date prior to 1959 was engaged at its plant in Heyburn, Idaho, in the processing of grains, grasses, and legumes into seed products, and in the wholesale sale and distribution of seed products.

(iii) Substantial quantities of the seed products referred to in subparagraph (I)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from the Western Seed,

Inc., plant in Heyburn, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating from galvanized iron and other sheet metals seed handling and processing equipment, such as tables, hoppers, chutes, sorters, etc., which was sold to and used by Western Seed, Inc., in the processing of grains, grasses, and legumes into the seed products referred to in subparagraphs (I)(ii) and (I)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(j)(i) Defendant's total dollar volume of sales of goods or services (or both) to Amalgamated Sugar Company at [fol. S] Burley and Paul, Idaho, during the years 1960 and 1961 was:

1960	$ 495.75
1961	11,559.80

(ii) Amalgamated Sugar Company is and since a date prior to 1960 was engaged at its plants at Burley and Paul, Idaho, in the processing of sugar beets and the manufacture of sugar therefrom.

(iii) Substantial quantities of the sugar referred to in subparagraph (j)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from the Amalgamated Sugar Company's plants at Burley and Paul, Idaho, to points outside of the State of Idaho.

(iv) During many workweeks in the years 1960 and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, galvanized iron and other sheet metals) sugar beet processing and sugar manufacturing equipment which was

sold to and used by the Amalgamated Sugar Company in the processing of sugar beets and in the manufacture of the sugar referred to in subparagraphs (j)(ii) and (j)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(k)(i) Defendant's total dollar volume of sales of goods or services (or both) to the Union Seed Company of Burley, Burley, Idaho, in the years 1959, 1960 and 1961 was:

1959	$477.55
1960	848.00
1961	288.00

(ii) Union Seed Company of Burley is and since a date prior to 1959 was engaged at its plant at Burley, Idaho, in the processing of grains, grasses, and legumes into seed products, animal feeds, wheat and similar commodities.

(iii) Substantial quantities of the commodities referred [fol. T] to in subparagraph (k)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from Union Seed's Burley plant to points outside of the State of Idaho.

(iv) During a number of workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating from galvanized iron and other sheet metals seed, feed, and grain handling and processing equipment, such as tables, hoppers, chutes, etc., which was sold to and used by the Union Seed Company of Burley in the handling and processing of the grains, grasses, and legumes into the commodities referred to in subparagraphs (k)(ii) and (k)(iii). In certain of the aforesaid workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(L)(i) Defendant's total dollar volume of sales of goods or services (or both) to the Burley Flour Mills, Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$ 1,358.28
1960	895.55
1961	1,102.70

(ii) Burley Flour Mills is and since a date prior to 1959 was engaged at its plant at Burley, Idaho, in the milling of flour from wheat and in the production of millfeeds.

(iii) Substantial quantities of the commodities referred to in subparagraph (L)(ii) have been and are being produced for interstate commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interestate commerce from Burley Flour Mill's plant to points outside of the State of Idaho.

(iv) During a number of workweeks in the years 1959, 1960, and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating (from stainless steel, copper, aluminum, or galvanized iron) equipment such as bins, hoppers, chutes, etc., which was sold to and [fol. U] used by Burley Flour Mills in the production of the flour and millfeeds referred to in subparagraphs (L)(ii) and (L)(iii). In certain workweeks some of defendant's employees spent a substantial part of their total hours worked in maintaining or repairing such equipment.

(m)(i) Defendant's total dollar volume of sales of goods or services (or both) to the Boise Cascade Container Corporation, Burley, Idaho, in the years 1959, 1960, and 1961 was:

1959	$656.45
1960	410.09
1961	155.97

(ii) Boise Cascade Container Corporation is and at all times since a date prior to 1959 was engaged at its plant at

Burley, Idaho, in the manufacture of corrugated cardboard shipping containers.

(iii) Substantial quantities of the containers referred to in subparagraph (m)(ii) have been and are being produced for commerce and have been and are being transported, offered for transportation, shipped, delivered and sold in interstate commerce from Boise Cascade Container Corporation's Burley plant to points outside of the State of Idaho.

(iv) During several workweeks in the years 1959, 1960 and 1961 defendant's employees spent a substantial part of their total hours worked in fabricating from galvanized iron, and in installing, ducts, vents, and dampers in the plant referred to in subparagraphs (m)(ii) and (m)(iii).

(n)(i) Defendant's total dollar volume of sales of goods or services (or both) to persons or firms other than those identified in subparagraphs (d)(i) through (m)(iv) in the years 1959, 1960, and 1961 was:

1959	$25,606.72
1960	38,944.26
1961	24,979.36

(ii) Following is a sample list of sales or services (or both) referred to in subparagraph (n)(i) taken at random [fol. V] in the years 1959, 1960, and 1961:

Name of Customer	*Commodity or Service Performed*	*Amount Charged*
Cassia County Schools	Make one garbage disposal tray 18 Ga. stainless steel	$ 34.00
Charles Chadwick	Fabricate and install gutter	30.40
Craner Produce	Fabricate one 14 Ga. CRI pan Standpipe	114.00
Jensen Construction Co.	290 feet flashing. 2 transitions	134.65

Name of Customer	*Commodity or Service Performed*	*Amount Charged*
Burley Herald-Bulletin	Duct Work	$39.50
Carlson Brothers	Aluminum tool box	62.30
Max Dayley	One 16 Ga. black iron furnace base	14.00
Larry Boyd	Fabricate 1 bathroom vent	6.50
Frank Chadwick	Make planter box	14.00
Marion Moncur	Fabricate one stainless steel dairy sink. 22 Ga.	65.00
Toner's automotive service	Fabricate bench top	38.60
Wayne Brown	Fabricate black iron hopper for tractor	91.35
Feeders Grain Supply	Fabricate 20 Ga. Galvanized square roof jack on pitch as ordered	18.50
W. W. Paulson	Make 12 x 12 x 4½ angle	2.20
Clyde Ross	Fabricate and install chimney extension	16.00
Bill Barkdull	Fabricate 2 caps for milk cans	3.50
5th and 7th Ward LDS Church	3 strips .050 aluminum, 2″ x 66″	3.00
Shelby's IGA Foodliner	Fabricate stainless steel hood for chicken cookers	39.45

These sales or services may be considered representative of all sales or services (or both) referred to in subparagraph (n)(i). At all times in each of the years 1959, 1960, and 1961 defendant was engaged in making sales of goods or services (or both) to the general public.

(o)(i) The total number of sales of goods or services (or both) made by the defendant in the years 1959, 1960, and 1961 was:

	1959	822
[fol. W]	1960	1,090
	1961	1,064

(ii) The total number of sales of goods or services (or both) made by the defendant to the firms identified in subparagraphs (d)(i) through (m)(iv) in the years 1959, 1960, and 1961 was:

1959	317
1960	434
1961	405

(iii) The total number of sales of goods or services (or both) made by the defendant to persons or firms other than those identified in subparagraphs (d)(i) through (m)(iv) in the years 1959, 1960, and 1961 was:

1959	505
1960	656
1961	659

(p) At all times in each of the years 1959, 1960 and 1961 defendant had one, and only one, establishment or place of business. That establishment or place of business was originally located at 759 Overland Street, Burley, Idaho. On July 1, 1960, defendant moved to its present location at 1197 East Main Street, Burley, Idaho. Defendant's place of business was and is a distinct physical establishment and was and is operated as a single unit. Its office and that portion of the premises not devoted to fabricating and processing activities was and is open at all times during regular business hours to that portion of the general public having business to transact at a custom sheet metal fabricating shop. Substantially all of the goods sold by said establishment were and are made and processed individually to meet the needs of each customer according to his own specifications.

All of the goods made and processed in said establishment have been and are being sold by said establishment.

(q) All of the services performed by the defendant for the persons and firms referred to in subparagraphs (c)(i) through (n)(ii) were performed on a so-called "time and material" basis—that is, the total amount which the defendant charged its customer for any given job was arrived at by adding the total charges for the labor required for the job at "X" dollars per hour plus the total charges for [fol. X] the material used in fabricating the articles or equipment supplied.

(r) In each of the years 1959, 1960, and 1961 more than 50 per cent of defendant's annual dollar volume of sales of goods or services was made within the State of Idaho.

(s) In each of the years 1959, 1960, and 1961 more than 75 per cent of defendant's annual dollar volume of sales of goods or services (or both) was not for resale.

(t) In each of the years 1959, 1960, and 1961 more than 85 per cent of defendant's annual dollar volume of sales of goods made or processed at defendant's establishments identified and referred to in subparagraphs (b) and (p) was made within the State of Idaho.

(u) Defendant employed the following employees at straight hourly rates of pay in the occupations and during the periods set forth opposite their names below:

Name	*Occupation*	*Beginning and Ending Dates of Employment*
Clifford L. Jackson	General Manager	6- 1-59 to 5-20-61
Gary O. Clark	Clean-up Boy	4-24-60 to 5- 7-60
Kosuvas C. Audritsakis	Sheet Metal Worker	1-15-61 to 2- 4-61
Ray L. Avery	" " "	7-24-60 to 8- 6-60
R. B. Boedecker	" " "	6-19-60 to 8-27-60
Clayton L. Cassingham	" " "	6- 1-59 to 4- 1-61

Name	*Occupation*	*Beginning and Ending Dates of Employment*
William E. Combs	Sheet Metal Worker	3- 6-60 to 12-17-60
Frederick L. Dickson	" " "	6-14-59 to 5-20-61
Robert A. Green	" " "	6-14-59 to 5-20-61
Roy L. Grindrod	" " "	2-29-60 to 5-13-61
Stanley W. Hansen	" " "	2-29-60 to 3- 5-60
Billy C. Shockey	" " "	2-19-61 to 5-20-61
Curtis E. Shockey	" " "	8-23-59 to 5-20-61
Robert A. Starkey	" " "	6-14-59 to 11-21-59

(v) During the years 1959, 1960, and 1961 defendant em- [fol. Y] ployed many of the employees named in subparagraph (u) for many workweeks longer than forty hours without compensating them for their employment in excess of forty hours during such workweeks at rates not less than one and one-half times the regular rates at which they were employed. The workweeks and the employees referred to in this subparagraph were the same workweeks and the same employees referred to in subparagraphs (d)(iv), (e)(iv), (f)(iv), etc., through (m)(iv).

(w) Since February 12, 1962, the date on which the complaint in Civil Action No. 3745 was filed, defendant has employed, and it is employing, many of its employees for workweeks longer than forty hours without compensating them for their employment in excess of forty hours in such workweeks at a rate not less than one and one-half times the regular rates at which they are employed. Said employees regularly spend a substantial part of their total hours worked in such workweeks in fabricating sheet metal products sold to and used by the Shelley Processing Company, the J. R. Simplot Company, Idaho Potato Processors, or other such firms identified in subparagraphs (d)(i) through (m)(iv) in the processing of potatoes into dehy-

drated or frozen potato products, substantially all of which have been and are being transported, offered for transportation, shipped, sold and delivered in commerce from the plants of said firms in Idaho to other States. In certain workweeks some of defendant's employees spend a substantial part of their total hours worked in maintaining or repairing such sheet metal products.

6. *Issues of Fact*—The following issues of fact, and no others, remain to be litigated upon the trial:

(a) Whether, during the years 1959, 1960, and 1961, 75 per cent of defendant's sales of goods or services (or both) was recognized as retail sales or services in the particular industry in which the defendant was and is engaged; and

(b) Whether defendant's establishments identified in paragraphs 5(b) and 5(p) were and are recognized as retail establishments in the particular industry in which the defendant is engaged.

[fol. Z] 7. *Mixed Issue of Fact and Law*—The following issue of mixed fact and law, and no other, remains to be litigated upon the trial:

Whether defendant's business is, by nature, outside the retail concept.

8. *Issues of Law*—The following issues of law, and no others, remain to be litigated upon the trial:

(a) Whether any of the defendant's employees were engaged in the production of goods for commerce within the meaning of the Act.

(b) Whether all of defendant's employees were exempt from the overtime requirements of the Act by virtue of their employment by a retail or service establishment as defined in section 13(a)(2)-13(a)(4) of the Act.

9. *Additional Matters Agreed on by the Parties*—The parties agreed that if the issues of law set forth in paragraph 8 are resolved in the plaintiff's favor, judgment may

be entered in Civil Action No. 3752 for the plaintiff and against the defendant for $500 plus costs. The right of appeal by either party shall not in any event be affected.

10. *Witnesses*—The names and addresses of the witnesses to be offered at the trial, together with an indication of the nature of the testimony to be given by each, are as follows:

Plaintiff—

On his case in chief, two as yet unidentified officials of defendant's customers identified in paragraphs 5(c) through 5(h) who will testify regarding the purpose, nature and necessity of the work which defendant performed for said customer. Plaintiff may also offer one or more witnesses, including experts, to rebut testimony adduced by the defendant on the exemption issue.

Defendant—

Vestal Coffin
Herbert Shockey

[fol. AA] Two as yet unidentified representatives of manufacturers and wholesalers of sheet metal products.

11. Exhibits—

Plaintiff will offer photographs of defendant's establishment identified and referred to in paragraph 5(b) and (p).

Defendant—copy of store license from State of Idaho.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and of law remaining to be litigated, this Order shall control the subsequent course of this action, unless modified at the trial to prevent manifest injustice.

Dated: Sept. 3, 1962.

Fred M. Taylor, United States District Judge.

Approved as to form and content:

James B. Leist, Attorney for Plaintiff.

Eli A. Weston, Attorney for Defendant.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

No. 3745

Honorable Fred M. Taylor, Judge

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,

vs.

IDAHO SHEET METAL WORKS, INC., a Corporation, Defendant.

Reporter's Transcript of Proceedings—September 4, 1962

Boise, Idaho

APPEARANCE OF COUNSEL:

For the Plaintiff: Mr. James B. Leist, U. S. Department of Labor, 1818 Smith Tower, Seattle, Washington.

For the Defendant: Mr. Ely Weston, 711½ Bannock Street, Boise, Idaho.

[fol. 4] The Clerk: Number 3745, Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, vs. Idaho Sheet Metals Works, Inc., a corporation, for Court trial.

The Court: Are you ready to proceed, Gentlemen?

Mr. Leist: The Plaintiff is ready, Your Honor.

Mr. Weston: The Defendant is ready.

The Court: You may proceed.

Mr. Leist: Mr. Carrier.

WALLACE J. CARRIER a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Wallace J. Carrier.

Direct examination.

By Mr. Leist:

Q. Where do you live, Mr. Carrier?
A. Burley, Idaho.
[fol. 5] Q. How long have you lived there?
A. Since I have moved back, I have been there fifteen years. I was born and raised in Burley, Idaho.
Q. What is your occupation?
A. I am manager of the Shelley Processing Company in Burley, Idaho.
Q. How long have you been the manager?
A. For fifteen years at Burley.
Q. What did you do before that?
A. I was employed by the J. R. Simplot Company at Caldwell, Idaho; I was manager of a processing plant at Bakersfield, California for six years previous to that.
Q. Let me interpolate here and ask how you happen to be up on the stand right now.
A. I was issued a subpoena by Arthur J. Goldberg, Secretary of Labor, to appear at the hearing.
Q. Mr. Carrier, I came down to Burley the latter part of last week, I believe on Friday, and talked to you for a little while; do you recall that?
A. I do.
Q. And you were kind enough to show me through the Shelley plant, is that correct?
A. Yes, sir.
[fol. 6] Q. And you did it pursuant to the instructions of your superiors?
A. That is correct.

Q. I believe during our discussion there in Burley last Friday you mentioned that you have been connected with the sheet metal industry yourself at one time; is that correct, sir?

A. I operated—owned and operated a custom machine shop—very little sheet metal, more on the heavier metal.

Q. What is that?

A. The heavier gage than the sheet metal.

Q. When was that?

A. That was in 1946, '47, and '48.

Q. For three years?

A. Yes, three years.

Q. Now, reverting to your present occupation, I believe the record shows to some extent, but I will ask you to state what the Shelley Processing Company produces.

A. We produce in Burley dry potato products—dehydrated potato products.

Q. Specifically?

A. Potato granules or instant potato, and we dehydrate potato sliced and dices of seven different sizes, the dry [fol. 7] potatoes.

Q. How long has the Shelley processing plant been in this business?

A. The Shelley Processing Company, Inc., was incorporated in Burley in 1949. Two years previous to that it was a part of the J. R. Simplot Company.

Q. It is now, as I understand, some sort of a corporate subsidiary of the J. R. Simplot Company?

A. That is right.

Q. When was the Burley plant which you manage built?

A. The Burley plant, that plant was built in 1928 as it was when J. R. Simplot Company bought it.

Q. Now, Mr. Carrier, I might say, for your information, that the particular years involved in the law suit are 1959, 1960, and 1961; this company and this plant at Burley were in operation prior to those years?

A. Yes, that is right.

Q. And making the same product?

A. That's right.

Q. I understand that your operations are, to some extent, seasonal in nature; is that true?

A. Yes, sir.

[fol. 8] Q. Will you give us an idea of what your average operating season is?

A. We call the average operating season, roughly, two hundred days from the first of September to the last of May or June.

Q. Is that approximately what you operated last year, that is to say, 1961?

A. That's right, yes.

Q. Mr. Carrier, at the cost of much blood, sweat, and tears, Mr. Weston and I, on behalf of the Plaintiffs and Defendants in this case, have stipulated—agreed on a great many of the facts, included among them is a stipulation to the effect that during many work weeks of 1959, 1960, and 1961, the Idaho Sheet Metal Works employees spent a substantial part of their total hours worked of fabricating potato processing equipment for the Shelley Processing Company, and we have agreed that the Idaho Sheet Metal Works income from Shelley was $90,000 in 1959 and $46,000 in 1960—in round numbers—and about $60,000 in 1961; and finally, insofar as this statement is concerned, the parties have agreed that this potato processing equipment that I referred to before, consists of such items as, and I quote—

The Court: Counsel, are you doing this for the edification [fol. 9] of the witness? The facts are in the record.

Mr. Leist: I have three more words.

The Court: Are you trying to brief the witness or are you going to ask him a question?

Mr. Leist: I am going to.

The Court: Ask him.

Mr. Leist: May I finish the sentence?

The Court: Yes.

By Mr. Leist:

Q. The parties have agreed that the equipment was vats, storage tanks, hoods, elevator buckets, chutes, and so forth. Now, the first question that I wanted to ask you is simply, do you agree with the accuracy of this last enumeration here; did the defendant supply you with these various items of equipment?

A. Yes, they did.

Q. Now, can you think of any other equipment that they supplied to you during these three years that we have not enumerated he[illegible]

A. Yes, I th[illegible] of one—one major item was repairing and rebuilding the drying equipment which was damaged in the fire and explosion.

Q. Repair and rebuilding?

[fol. 10] A. Right.

Q. Of drying equipment?

A. Right.

Q. When did this explosion occur?

A. We had a fire and explosion in 1959, I couldn't state the specific date, and another in 1961.

Q. Now, as I understand it—as a matter of fact, I believe you have testified that the product which Shelley Products produces is dehydrated potato products.

A. Right.

Q. Dehydration is the purpose of that plant being there, dehydrating potatoes?

A. That is correct.

Q. And this equipment that you have just referred to which the Defendant repaired and rebuilt was dehydrating equipment?

A. Right.

Q. Now, referring back to those general words that I quoted a moment ago, I would like to take the first, the vats, and ask you if you can be a little more specific than that and tell us what kind of vats has the Defendant fabricated for Shelley Processing Company; can you name one?

[fol. 11] A. Well, I don't call them vats—I have never

used that—we call them tanks, bins, or hoppers—let's put it that way.

Q. Do they have some kind of a name; I am asking that so it will be easier to talk about them?

A. No, vats and tanks would cover it. We have surge tanks and hoppers, they are the same.

Q. That is the type of thing I am getting at—a receiving vat; would that be a vessel?

A. Right.

Q. Alright. Now, can you take one and tell us where it is located in the processing line?

A. We have receiving tanks that is located, I'll say, before or after the trim tables which receives the potatoes from the trim tables, which goes into all of the lines. We have four such tanks after the potatoes go over the trimming tables and they go to the receiving tanks, and they go on an even flow or controlled feed in the individual processing lines.

Q. Let's stop there, Mr. Carrier, and I want to ask you to describe these tanks.

The Court: Counsel, in view of the very fine pre-trial order in which you set out that the equipment is processed and built for this company, and the equipment was used for the production of products in interstate commerce, is it nec-[fol. 12] essary to go into all of the details of what the equipment is?

Mr. Leist: I believe, Your Honor, that it will have a bearing on one of the prime issues of the case, in fact, I am certain that it will. I feel that it is necessary to show, in somewhat greater detail than the pre-trial order does, what equipment we are talking about. Ideally, it might be better for Mr. Carrier to testify at two different points—here and as a rebuttal witness, but because I know he is an extremely busy man at this time of year, I thought that I would elicit all of the testimony at this time.

The Court: Maybe I don't understand the question at issue. You have narrowed the issues in the pre-trial order. I don't understand that there is any dispute as to what the

items are or what they were used for. I don't know or see the point of your going into detail as to what each piece of equipment is. It seems you are taking unnecessary time.

Mr. Leist: If the Court will permit, I have a certain plan about the case. I believe it is important testimony here and I will appreciate it if the Court will permit me to continue.

The Court: I am not trying to cut your case down but I [fol. 13] don't see the necessity of going into something that has been agreed on.

Mr. Leist: Well, sir, this particular point has not been agreed on.

The Court: Very well, go ahead then.

By Mr. Leist:

Q. Mr. Carrier, I will ask you now to describe this receiving tank that we were talking about in terms of dimensions, first; how long is it, how wide, and how high is it, to the best of your recollection?

A. Approximately three feet wide, four feet high, and about ten feet long.

Q. Now, also, to the best of your knowledge, what is its capacity—how much liquid will it hold?

A. Liquid, I will have to guess.

Q. Excuse me, I don't know what it holds, so whatever it is designed to hold, how much of it will it hold?

A. Approximately 5,000 pounds of peeled potatoes.

Q. What kind of metal is it made of?

A. Stainless steel.

Q. Do you happen to know the gage of the stainless steel?

A. I would have to guess—12 gage.

[fol. 14] Q. Twelve?

A. Right.

Q. Is that a heavy or light gage?

A. Its fairly heavy on stainless steel or sheet metal—that is my interpretation.

Q. That is a type of storage tank?

A. Yes.

Q. Would you describe a hood in somewhat the same way that you have the tank in the terms of its dimensions —what purpose does the hood serve?

A. The hood carries off the steam and vapor that is in the plant through the roof into the atmosphere, they are vent stacks.

Q. Can you think of one particular hood in your plant and tell us where it is?

A. We have hoods over each end of the cookers, which are approximately five feet square on the bottom and about four feet high where they go to the vent stacks.

Q. Are they also made out of stainless or some other metal?

A. We have galvanized and stainless—we have about fifty in the plant.

Q. Do you know what the gage of the metal is?

A. About eighteen gage.

[fol. 15] Q. That is lighter?

A. Yes, that is lighter.

Q. And the elevator buckets, what are they, sir?

A. We have three different types of elevator buckets in the plant—we have plastic, and galvanized, and stainless steel buckets.

Q. Does the Defendant make all three of the types for you?

A. Not all three, no.

Q. I am interested in the ones, the buckets that the Defendant has made for you.

A. In the past, I would say three or four years, that the elevator buckets that the Defendant has made have been out of stainless steel.

Q. And I presume that the mane, that the elevator bucket, is a sort of hoisting apparatus?

A. That's right.

Q. How does it operate?

A. They are bolted on to a vertical lift belt at twelve inch intervals, and it goes to the top and is discharged out of the top.

Q. The purpose is to get the product from one point to another in the processing line?

A. Right.

[fol. 16] Q. What of the chutes, what do you use them for?

A. Pan or transfer conveyors to transfer product from one point to another or one belt to another.

Q. What does a chute look like?

A. Well, I could describe it best as a deep trough—you have a bottom and two sides on it, and the product slides down to something else.

Q. Can you describe, in your mind's eye, or think of one that is average—not the longest and not the shortest—a particular chute, and describe it in terms of its length?

A. We have chutes at the end of the trim tables about ten inches wide, eight inches deep, with a round bottom, and approximately twelve feet long where the potatoes are transferred from the trim table into a conveyor.

* * * * * * *

[fol. 17] By Mr. Leist:

Q. Mr. Carrier, I believe that you have already just now [fol. 18] testified that this equipment which we have referred to here as the elevator buckets could properly be called hoisting equipment; is that correct?

A. That's correct.

Q. I believe you told me when I was down to talk with you on Friday that Mr. Simplot gives you a pretty wide latitude about the operation of your plant from day-to-day as to what you are going to do in the way of remodeling or revamping the production line from year-to-year?

A. That is correct up to a point. We talk it over and he says to do it or not and the details are left up to management.

Q. I believe you told me some rather remarkable things of the extent you have taken advantage of the lattitude and revamped the production line in the last few years. Will you tell the Court about it?

A. Not so much I have taken advantage of the lattitude, but through the company we have changed our plant seven years in a row. I have dismantled the plant and rebuilt it—the equipment every year for seven years. We have made radical changes in the processing—one is the increased production and the other is the new methods of production. A relatively new product, we feel, takes changes every year.

[fol. 19] Q. Now, I would assume that when you get ready to make one of the major operations in the plant that this is done on the basis of the preceding year's experience, is that correct?

A. Yes.

Q. And I would assume that you have a pretty good idea of how you want to change things?

A. Of the company personnel, yes.

Q. How do you go about deciding who is going to do the work?

A. We talk it over with Mr. Jones and Mr. Simplot, and from there on down its left up to management to get it done.

Q. To you, in other words?

A. Right.

Q. Now, is a good part of the work sheet metal work?

A. A portion of it—I couldn't say a good part of it, it depends on what we are doing—it could be, or a minor item, if you are changing your building.

Q. How do you decide who is going to do it, what firm?

A. That is up to management—to me.

Q. You are a part of management; do you have anything to say about it?

[fol. 20] A. Yes, I have quite a bit to say about it. At times we call our people in from other plants. A lot enters into the size of the job and how much time we have to do it.

Q. Its obvious from the agreed facts that you have, in the last three years at any rate, given this work, or a good part of it, to the Defendant here, the Idaho Sheet Metal Works?

A. That's right.

Q. How do you go about letting them know what is to be done?

A. Personal contact.

Q. Your personal contact?

A. That is correct, yes.

Q. You get in touch with whom?

A. The manager of the Idaho Sheet Metal.

Q. Who is that?

A. I dealt the last three years with Cliff Jackson, the man at Burley.

Q. Tell us what you do, Mr. Carrier; do you go to his place of business or does he come to yours?

A. Either way, I am at his office or he is at our place. We go on the job and I tell him what I want to do and we draw the sketches on paper or the floor and he goes back and starts to build it.

[fol. 21] Q. Who makes the sketches?

A. Both of us. In some cases we do the sketch work in the office—we do the sketches of the dimensions and show it to him and say, "Build it".

Q. Is there a formal contract for the work?

A. No. There have been purchase orders or authorization on the work in the form of a purchase order or written order.

Q. Do you know ahead of time how much work will be done?

A. I know at the spring of the year how much is going to be done that summer.

Q. During the whole summer?

A. Yes.

Q. And this is something that you tell Mr. Jackson when you are talking to him and drawing up the sketches?

A. Not so much on their individual end, but the company budget that I propose and submit to our general office that the sheet metal work is included on.

Q. You have an idea of what is going to be done in the way of repairs and remodeling?

A. Yes.

Q. And you tell Mr. Jackson?

[fol. 22] A. No. I might work a week or two, or a job at a time before I tell him what I want.

Q. Now, what about the matter of costs; is there some agreement about how much?

A. On any of our jobs that we plan ahead and talk to Idaho Sheet Metal, whether its pipe or sheet metal, I have a good idea of what the job is going to cost. Our personnel has gone over it and presented it to the general office and we have a good idea of each individual cost.

Q. You, having a background in sheet metal, does that have anything to do with it?

A. Yes, I can figure the square feet, and the pounds of metal and the labor.

Q. And you and Mr. Jackson estimate the labor together?

A. That's right, we do.

Q. Now, could you say that you know before you start out on these alterations in a given year—do you know just about how much they are going to cost?

A. In round figures. I have missed it quite a few times, and sometimes I have hit it pretty close on the proposed budget.

Q. And the matter of payment; how do you pay Idaho Sheet Metal for the work that they do?

[fol. 23] A. They present me with an invoice monthly, or every week, or every two weeks, and its after a certain phase of the job, and we put labor and material on the particular job.

Q. And they present you with an invoice and you pay it?

A. Right.

Q. That is not at a stated interval?

A. Most of the time I think it is on a monthly basis. There have been different payments.

Q. As the work progresses?

A. Right.

Q. Mr. Carrier, one thing that I would like to ask you about the work, does the Idaho Sheet Metal Works employees install some of it?

A. Yes, some of it they do.

Q. Does this—is this more or less a regular thing?

A. It depends on the job that it is and the availability of the men that I have, and, as I say, the particular job. If we have men available we work together on a lot of jobs, Idaho Sheet Metal men and my men under my supervision or theirs getting the work done.

Q. Some of the work can be fabricated in the Defendant's [fol. 24] plant, is that correct?

A. Some of it can be prefabricated—its hard to answer the question. Some can be, yes.

Q. And some of it has to be done on the site where it will be installed?

A. That is correct, yes.

Q. Mr. Carrier, do you think that it is fairly accurate to refer to the things that the Idaho Sheet Metal Works make for Shelley as "potato processing equipment"; is that a fair name to put on it?

A. Yes, I do.

Q. Could you also say that it was potato dehydrating equipment?

A. Yes, I would say that everything they have built has fit into the processing plant for dehydrating or processing.

Q. Who, other than the Shelley Processing Company, would have use for equipment of this type?

A. Well, there is other plants several places in the United States that use similar equipment or portions of similar equipment, or could use it—maybe a dozen or fifteen—or there is other types of plants that use the other equipment —the hoods, and stacks, and such, they could be used on other equipment.

Q. Do you think that it would be fair to say that the [fol. 25] market for the type of equipment that Idaho Sheet Metal Works makes for Shelley is limited?

A. Would you ask the question again.

Q. Do you think it would be fair to say that the market for the type of equipment that the Defendant makes for your company is limited?

A. Well, I really don't know how to answer the question. What do you mean by "limited"?

Q. If you don't know how to answer it, say so, and that is that.

A. I don't know how to answer it.

Q. Mr. Carrier, this work that is done every year, or from year-to-year; to what extent do you oversee it or supervise it during its processing?

A. One hundred per cent. I am there during all of the working hours.

Q. Mr. Carrier, you have said, did I understand, that you have lived in Burley for fifteen years?

A. I have been back for fifteen years. I was gone for five years. I was born and raised in Burley and was gone for five years and I have then been there fifteen years since I moved back.

Q. Where is downtown in Burley?

A. We speak of downtown as around the stop light—the corner of Main and Overland.

[fol. 26] Q. And I believe that you have been out to the Idaho Sheet Metal Works?

A. Right.

Q. How far is it from downtown out to the plant?

A. I'd say roughly three-fourths of a mile.

Q. What kind of a building is it?

A. A cinder block building.

Q. How many stories?

A. One story.

Q. Is it one floor—isn't it two stories high?

A. Well, its a high ceiling building, let's put it that way.

Q. What about, again, I am thinking of the outside—what kind of doors does it have in it?

A. The small door on the front is a metal door, and the side are of wood construction, sliding doors—large.

Q. What do you mean, in terms of feet?

A. Roughly fourteen feet wide and fourteen feet high.

Q. Do you recall that it has a show window?

A. I don't think it has, no.

Q. Where is it situated with respect to the highway?

[fol. 27] A. Its approximately two hundred feet off the highway, back in back of a used car sales yard.

Q. What does it look like on the inside?

A. Cinder block inside painted, with open beam ceilings, and a solid built up roof, I call it.

Q. There are some—is there anything in it?

A. Machinery and the small office and little store room in one corner.

Q. Does it have a cash register?

A. I don't know.

Q. It has employees?

A. Yes, there have been people working in there every time I have been in.

Q. What kind?

A. Sheet metal and welders, I guess.

Mr. Leist: That is all I have of this witness.

The Court: You may cross-examine.

Cross examination.

By Mr. Weston:

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[fol. 32] Q. Will you give us a farther example of the type of work that you ask of the defendant in addition to the building of the vats or tanks; generally, what are the other types of services that you use them for?

A. I could quote, as of right now, the past thirty days they have been installing equipment and remodeling some of the equipment and building miscellaneous chutes and conveyors.

Q. And guards for motors, and things of that kind?

A. That is correct.

• • • • • • •

[fol. 33] Q. When you say they install, that refers to the items referred to by Mr. Leist; the vats, and ducts, and the elevators, those?

A. There are very very few items in the last years that Idaho Sheet Metal have installed one hundred per cent. They are in the plant working under my supervision.

• • • • • • •

[fol. 35] Redirect examination.

By Mr. Leist:

* * * * * * *

Q. Now, I have only one other thing to ask you about and that is, that receiving tank which we talked about on your direct-examination and Mr. Weston asked when was it made, and you said in 1955; do you have other similar tanks that have been made in the last three years?

A. Yes.

Q. By the defendant?

A. Yes.

* * * * * * *

[fol. 36]

STIPULATION RE TESTIMONY OF MR. PAUL L. HANSON IF CALLED AS A WITNESS, ETC.

Mr. Leist: May I make this statement beforehand: the next witness is Mr. Hanson. He is the General Manager of the J. R. Simplot Company at Heyburn. To a certain extent his testimony will be cumulative. I want to show that this is not an isolated instance, the things that Mr. Carrier has testified to. Because we are running late, if Mr. Weston would stipulate that Mr. Hanson will testify to approximately the same thing, I will forego calling him.

Mr. Weston: Pardon me a moment.

The Court: Certainly.

Mr. Weston: May we have a moment for a conference, if the Court please?

The Court: Yes. We will take a ten minute recess. If you are going to forego calling the witness you better stipulate, if I may suggest, to the effect that if the witness were called he would testify to certain things. Whatever you can agree on.

(Whereupon the court recessed for ten minutes.)

[fol. 37] The Court: You may proceed.

Mr. Leist: Your Honor, I don't know whether we can stipulate in the particulars that the Court had in mind, but I would like to read a very rough proposed stipulation, and it has not had Mr. Weston's complete agreement. The Plaintiff and Defendant hereby stipulate that if Mr. Paul L. Hanson, the General Manager of J. R. Simplot, Heyburn, were called as a witness in this case, his testimony on the matters hereafter referred to would be substantially the same in all respects as the testimony which has just been given by Mr. Wallace J. Carrier, General Manager of the Shelley Processing Company, Burley, Idaho. Among the matters referred to are the type of equipment furnished to the J. R. Simplot Company by the Defendant, the function of that equipment, with the exception that the J. R. Simplot Company is engaged in the production of frozen foods rather than dehydrated foods at Heyburn, and the circumstances of arranging for the work to be done—performed between the defendant and the J. R. Simplot Company and the extent of the installation work as performed and as contrasted with fabrication, and repair, and maintenance, and the method of payment.

Now, I might say in that connection that it should be a [fol. 38] part of the stipulation that there would be this added difference, that the J. R. Simplot plant at Heyburn did not burn down and was not replaced as Mr. Carrier testified that the Shelley plant at Burley was. I don't believe we can make it exclusive, Your Honor. I may have overlooked something here—that I cannot do off the cuff.

The Court: You are making your record, I am not. Do whatever you want to do, you can stipulate or call him as a witness.

Mr. Weston: If the stipulation is acceptable to the Court; I would like to have it read back, if I may.

(Stipulation read by the Reporter.)

Mr. Weston: Agreed.

Mr. Leist: Agreed.

The Court: Very well. Call your next witness.

Mr. Leist: Mr. Shockey.

HERBERT J. SHOCKEY a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

[fol. 39] The Clerk: State your name for the record.
The Witness: Herbert Shockey.

Direct examination.

By Mr. Leist:

Q. Where do you live?
A. 2520 Hillway Drive, Boise.
Q. What is your occupation?
A. I am President of the Idaho Sheet Metal Company in Boise and President of the Idaho Sheet Metal Works in Burley.
Q. The latter company is the defendant?
A. That's right.

Mr. Leist: I am calling Mr. Shockey under Rule 34(b).
The Court: Very well.

By Mr. Leist:

Q. You were in the courtroom when Mr. Carrier testified?
A. Right.
Q. I would like to ask you about the machinery that Mr. Carrier said was in the plant there at Burley. Now, first, do you have a machine there called a "power shear"?
A. We do.
[fol. 40] Q. What is the function of that machine, Mr. Shockey?
A. To cut sheet metal with.
Q. And will it cut any and all gages of sheet metal?
A. Yes, all gages of sheet metal.
Q. From?
A. When you are talking of sheet metal, it only goes to ten gage, and then its plate.
Q. Will it cut ten gage?
A. It will.

Q. Is ten gage the heaviest?

A. No, it will cut heavier, it will cut three-sixteenths, but the shearer is not in good enough condition to cut more than ten gage constintantly, its an old machine—about fifty years old.

Q. How old?

A. Fifty years.

Q. Fifty years?

A. I'm a little wrong, it's about forty-six.

Q. One of the descriptive phrases, I suppose you would say about the shearer is that it is ten foot; what is that?

A. It will shear a piece of metal ten feet long.

[fol. 41] Q. That is the length of the metal that the machine will shear?

A. That is the maximum length.

Q. How big is the machine—how high is it?

A. Well, the overall height of the machine is approximately and and a half feet.

Q. How long?

A. Approximately thirteen feet.

Q. How wide?

A. Approximately four feet.

Q. How is it driven?

A. With a motor.

Q. What power?

A. Electric.

Q. Electric motor?

A. Yes, electric motor.

Q. Now, you also have a power roller in the shop, do you not?

A. That's correct.

Q. What is its function?

A. To roll up pipe—roll metal into pipe or troughing.

Q. Would it be to bend metal into a round shape?

A. That's right.

Q. What does this machine look like?

[fol. 42] A. Well, the type we have is what they term an initial type roll.

Q. How high is it?

A. Oh, approximately three feet.

Q. How wide?

A. Approximately thirty inches.

Q. How long?

A. I believe the one in Burley is overall about eight and a half feet.

Q. And is it also operated with electricity?

A. Yes, an electric motor.

Q. Do you have a power brake there?

A. Yes.

Q. What is its function?

A. To form the metal—forming metal.

Q. Does it form it in a different way than the power roller?

A. Yes.

Q. How?

A. It doesn't roll it into a cylinder—to bend it at an angle.

Q. Bend it?

A. Yes.

Q. What does it look like?

A. This particular one is a press brake and its approxi- [fol. 43] mately ten feet high, fourteen feet long, and about six feet through or wide—whichever way you'd say.

Q. How does it operate?

A. With electricity.

Q. Do you know how much a power shearer would cost you new?

A. New?

Q. Yes.

A. With the capacity that we have or the capacity that would cut as we have now?

Q. To replace it, one like yours.

Mr. Weston: I don't believe it is material as to what the equipment costs. I think what counsel is trying to establish is how well equipped the shop is, but I don't believe the cost would have anything to do with the issue.

Mr. Leist: I am trying to establish one thing in the case by asking him questions. My contention is that this is a

factory which does maybe a little retailing, and his contention is that it is a retailer that does no manufacturing, and I think this is very material.

The Court: He may answer.

[fol. 44] By Mr. Leist:

Q. The question, as I recall, how much would the replacement cost of this power shearer be?

The Court: Are we talking of the replacement or this one?

Mr. Leist: No, sir, how much it would cost to replace.

The Court: Objection sustained.

The Witness: Could I talk?

The Court: No, not until there is a question. We are talking of this plant, Mr. Leist, not another plant.

By Mr. Leist:

Q. Mr. Shockey, how many employees do you have at the present time?

A. I believe eleven or twelve.

Q. In this the average number of employees that you have had for the past three years?

A. Well, a custom sheet metal shop like ours is a very seasonal proposition. We do not manufacture anything and we can only do business when a customer calls and we build it to their customized conditions. We do not have but a few men we keep on the payroll throughout the year, in fact, I don't believe there is over two that is steadily employed in the plant, the rest of the men are seasonal. We [fol. 45] do not manufacture and stock pile to sell to anyone.

Q. I'm not certain that you answered the question, Mr. Shockey. All I wanted to know is, when you are operating, do you have eleven employes, or about that?

A. I would say approximately ninety days out of the year, yes.

Q. All right, sir.

A. However, that condition changes.

Q. Mr. Shockey, what goods do you carry in your inventory?

A. A little bit of down spout and a few conductor elbows, and bolts and nuts, and a few little pieces of copper, and quite a bit of sheet metal of various gages, we have twenty-five or thirty different types and gages of metal that we carry.

Q. Is the bulk of your inventory sheet metal?

A. Yes.

Q. And the other things like the drain spout, that is incidental?

A. Yes, incidental.

Q. Now, you buy the sheet metal in big sheets?

A. Well, they come in thirty-six and forty-eight inches, and ten feet long, that is the general size.

[fol. 46] Q. And then you use these machines that you have just described to do something to the metal, is that correct?

A. That's correct.

Q. And when the metal leaves your shop it is in a different shape and form than when it came in?

A. It depends on what the customer wants, correct.

Q. Do you sell any sheet metal as such?

A. Occasionally.

Q. What portion of your business is concerned with the selling sheet metal as such?

A. Well, that is a real tough question, it might be one per cent or it might be three.

Q. Very small in comparison with the rest of your business?

A. That's correct.

Q. Do you advertise in the daily newspaper?

A. In the Burley paper, yes.

Q. How often do you run an ad?

A. I can't answer that question.

Q. Is it daily?

A. When the manager of the plant gets up here he will answer the questions for you.

Q. Do you advertise on TV?

[fol. 47] A. No.

Q. Radio?

A. No.

Q. Here is a quotation I want to ask you a question about Mr. Shockey: "There are many articles made of sheet metal that are capable of standardization and are manufactured by large factories on a production basis and distributed to the public in the wholesale and retail channels". The first thing that I want to ask you is, do you agree with it?

A. Well, yes. There is many items that are manufactured, yes, that is the reason we are a little shop.

Q. Sir?

A. That is the reason we are a small custom shop. We can't compete with a manufacturer.

Q. You have been in the business for quite a few years, have you not?

A. Yes.

Q. Will you name some of the "many articles made and distributed" in that way?

A. Washing machines, and refrigerators, and wash tubs, and stock tanks, and sheep troughs, and you could think of a lot of them—a lot of different things—automobiles.

[fol. 48] Q. Do you sell any of these articles?

A. No, sir—when you say any, I have to retract, occasionally we build a sheep tank for a farmer that wants to water sheep in it.

Q. That is minor?

A. Yes.

Q. Just a little bit of your business?

A. Yes.

Q. How many sales clerks do you employ at the Idaho Sheet Metal Works?

A. None.

Q. I believe that you mentioned a moment ago that you never fabricated for stock as opposed to special orders?

A. I didn't hear you.

Q. Do you ever fabricate articles for stock as opposed to fulfilling a special order?

A. No, we don't stock any merchandise at all except the flat sheets and conductors and gutters.

Q. Mr. Shockey, in answering an interrogatory that the plaintiff served on you last May, in June you answered by saying this—this is Mr. Weston, this is Number 19. You said: "This store has a retail store license issued by the State of Idaho". Now, first, I want to ask you whether you [fol. 49] ever at any time prior to the commencement of this litigation actually thought of your Burley establishment as being a store?

A. Well, we have to have a store license to operate.

Q. That is not what I asked you, sir. Will you read the question?

(The Reporter read the question as it appears on page 48, line 20.)

A. We are a retail sheet metal shop. We have to have—I was wrong when I made the statement if I made the statement that we had a retail store license—we have a state store license, it doesn't say whether its a retail store license or what it is—its a store license—it doesn't specify that it is retail.

Q. What I want to know, before the law suit started, did you personally ever think about this establishment at Burley as being a store?

A. Absolutely.

Mr. Weston: I'm not sure that the witness knows what is meant by a "store". He says that he felt they were a retail establishment. I don't know what is meant by a "store" either.

The Court: The answer may stand, he has answered the question.

[fol. 50] By Mr. Leist:

Q. You say you did?

A. Pardon?

Q. You thought of this place as a store?

A. As a retail sheet metal shop where you cannot buy anything that is prefabricated. Every job we do is to the customer's specific recommendations and to his personal use. We do not stock any merchandise that is prefabricated that you can pick up from a counter but a few pieces of gutter and down spout.

Q. You don't have a counter, do you?

A. Its a matter of interpretation. We have six counters, work benches, and they serve as counters as a customer comes in, about the same as if you came into a store and a clerk got out a bolt of cloth, we get out a piece of sheet metal and put it on the counter or work bench and fabricate it to what the customer would like to have to meet his specifications.

Q. You have nothing manufactured?

A. No, we are not a manufacturing outlet.

Q. You have nothing to fabricate?

A. We don't manufacture anything. We do manufacture stuff in the Idaho Sheet Metal Company in Boise but not in Burley.

Q. I still don't believe you have answered the question as [fol. 51] to whether you personally ever thought of this establishment as being a store before the law suit began.

A. All of my life I have recognized our business as a retail business.

Q. I am not asking you that. I am asking if you thought of the establishment as being a store before the law suit started.

Mr. Weston: I am confused, and I imagine the witness is. I don't know what he means by a store. He has testified as to what he runs and what he thought it was. I don't believe its relevant here; I believe the Court wants the facts and the Court will determine whether its a store.

The Court: You asked him what he thought it was and he told you. The objection will be sustained. The question is repetitious. I don't know what you mean by a store either, there are various and sundry stores. He has told you what he considered his business to be and that is an answer to your question as far as the Court is concerned.

By Mr. Leist:

Q. Well, may I ask you this, Mr. Shockey: who named this business?

A. I did.

[fol. 52] Q. Why did you put in there the word "Works" instead of "store"?

Mr. Weston: If the Court please—

Mr. Leist: Let him answer.

The Court: Mr. Leist, Mr. Weston has the right to make an objection, he is on the other side of the law suit.

Mr. Weston: We are getting into the matter of conjecture and speculation as to why he put the name into the corporation. I think that the Court can take judicial notice where he got the name. We have all sorts of fanciful ideas. I can't see why he should not use the word "store" in place of "works".

Mr. Leist: If I may—

The Court: Just a minute. If he knows why he used the word "works", he may answer the question.

The Witness: We have one that is the Idaho Sheet Metal Company, and when we formed the other we figured we would call it the "works". I couldn't call both of them "company"—I wanted it different.

By Mr. Leist:

Q. Why didn't you call it the "Idaho Sheet Metal Store"?

A. Why do they call it the Hotel Boise? I don't know.

[fol. 53] Q. What do you think of a company that would be the "Albertson Food Works"?

Mr. Weston: I am going to object, it is improper and argumentative.

The Court: Objection sustained. He answered the question.

Q. Mr. Shockey, do you regard the Idaho Sheet Metal Works, Incorporated, as a service establishment?

A. Well, I don't understand what your interpretation of a service establishment is. Maybe.

Q. You don't know what a service establishment is?

A. I don't know what your terms of it is, I know what mine are.

Q. Well, would you care to answer the question any farther?

A. Well, a place where people can come and order something and which can be fabricated for them, that is what we call—that is what we would term service to an individual, and if he could go to the Salt Lake Hardware he could go and buy it, but it is custom built and not manufactured by a manufacturer. There is two separate categories in the manufacturing; one is a retail custom shop that supplies the piece to the individual that is not manu-[fol. 54] factured for public use; that is our category. We are a retail custom building shop.

Q. Do you regard the defendant as a service establishment?

A. I don't know whether to answer the question or not.

Q. It seems that the answer is "yes" or "no"; can't you answer it that way, one way or the other? You do or do not regard the defendant as a service establishment?

A. Well, it is, yes.

Q. Thank you. Mr. Shockey, you were here when Mr. Carrier testified?

A. Yes.

Q. I asked him a question that he could not answer. I am going to ask you the same question. Insofar as the type of equipment which the defendant has fabricated for Shelley and J. R. Simplot and the other big potato processors in the Burley and Heyburn area, would it be fair to say that the market for this type of equipment is limited?

A. Definitely. Its all custom built stuff to fit in each individual case.

* * * * * * *

[fol. 57] Cross examination.

By Mr. Weston:

* * * * * * *

[fol. 58] Q. How long have you been in this particular occupation or work of processing and selling tin or sheet metal products?

A. Approximately thirty-nine years.

Q. Did you operate a shop in Boise at one time?

A. No.

Q. Where did you first operate your shop?

A. Well, yes, the first shop is in Boise.

Q. Is that what is called a tin shop?

A. That's right.

Q. And what you are operating now, is that a tin shop?

A. That is the term we have always used.

Q. In describing the machines, is that the standard equipment for a tin shop?

A. Yes.

Q. The machine that is fifty years old, is that what was used fifty years ago in a tin shop?

A. That is right.

Q. Is there any other place in the industry where the [fol. 59] general public or an individual can go in and purchase a product such as you make, other than your type of establishment?

A. No.

Q. And the articles that have been described as being manufactured, where are they sold?

A. Warehouses and wholesalers, and in hardware stores.

Q. You do not manufacture that type of product?

A. No. Lumber yards and—

Q. Do you charge a retail price for the items?

A. Yes, sir.

Mr. Leist: Your Honor, I object to that. Who knows what a retail price is?

Mr. Weston: I will withdraw the question.

The Court: Do you want to withdraw the answer too?
Mr. Weston: Yes, both.

* * * * * * *

[fol. 60] By Mr. Weston:

Q. In case you fabricate or change the sheet of metal into something for a customer, how do you figure the price on that?

A. What it cost and the percentage of profit, and the cost of labor, and the operating costs.

Q. Is that a standard price to everyone?

A. That's right.

* * * * * * *

[fol. 62] Redirect examination.

By Mr. Leist:

Q. Mr. Shockey, you have just testified in response to one of Mr. Weston's questions that these items that you fabricate at Burley are sold at a standard price to every-
[fol. 63] one; that was your exact wording, a standard price to everyone.

A. I want to hear that again.

Q. You have just testified in response to one of Mr. Weston's questions, and in reference to the articles that you fabricate at Burley, that they are sold at a, quote, standard price, to everybody. Actually, I am not through with the question. First, I want to ask you, are you including in that the potato processing equipment which you make and sell to Shelley and J. R. Simplot and Idaho Potato Processors?

A. Yes.

Q. Who is everyone?

A. Everyone we deal with.

Q. Are they all potato processors?

A. No.

Q. For this type of equipment, hoods and vats?

A. No.

Q. Who else do you sell to?

A. Amalgamated Sugar Company, and with creameries, and farmers, and we do business with restaurants—in fact, we do quite a bit of restaurant work at times.

Q. Mr. Shockey, to whom would you sell a receiving tank, the capacity of which is 5,000 pounds of potatoes, other than a potato processing company?

[fol. 64] A. Its possible we might sell it to the Amalgamated Sugar Company if they desired one and asked us to build it.

* * * * * * *

Recross examination.

By Mr. Weston:

Q. Would you say that your establishment in Burley was set up to serve the general public?

A. Yes, in fact we put the plant in there, our sheet metal shop in there, before all of the processing plants came there.

[fol. 65] Q. In point of number of sales and services, do you have more to the general public?

A. Yes, its approximately sixty per cent to the general public and forty per cent to the customers.

Q. I am talking of the number.

A. Yes, sixty per cent to the public and forty per cent to the processors.

Mr. Weston: That is all.

Mr. Leist: I have no other questions to ask Mr. Shockey.

* * * * * * *

[fol. 67] Virgil P. Coffin a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: Virgil P. Coffin.

[fol. 68] Direct examination.

By Mr. Weston:

Q. Will you state your name, residence, and profession?

A. V. P. Coffin, Boise, Idaho; I am a lawyer.

Q. Are you connected with the defendant in this case?

A. As an independent contractor, yes. I take care of their accounting and internal auditing and their tax and legal matters.

Q. How long have you been connected with this company?

A. From the time that it started, which was January 1, 1957.

Q. Prior to that time were you in any way connected with the Boise operation?

A. Yes.

Q. What is the name of that corporation?

A. Idaho Sheet Metal Company.

Q. How long were you connected with them?

A. Beginning on June 1, 1945.

Q. Did you have any connection with the industry encompassing tin shops and metal shops before that?

A. Yes, I did. When I was thirteen, fourteen and fifteen years old, my father and uncle had a retail hardware store [fol. 69] here in Boise. During the summer school vacation I worked in the store and in the basement was a tin shop. That tin shop was an intriguing institution to me and I got down to see what was going on and learn what I could from the tinner. This was operated in the same way that the sheet metal shops are today. It was smaller—the people would come in—it was custom—and they ordered stove pipes or tanks and the tinner would make it up for them on the specifications.

Q. Are you familiar with the operation of the tin shops or the metal shops as they may be called now?

A. Yes.

Q. Will you tell us whether they are considered as a retail establishment or not?

A. Yes, they are considered retail establishments, the reason being that the entire custom sheet metal industry is a retail industry.

Mr. Leist: Excuse me, Mr. Weston. I would like to object, Your Honor. If I understand the purport, have you qualified him as an expert?

Mr. Weston: I think he is expert, yes.

Mr. Leist: On the basis of working in his uncle's tin shop when he was thirteen or fourteen years old?

The Court: He has answered the question.

[fol. 70] Mr. Leist: I move that the answer be stricken; that he is not an expert or he has not been—

The Court: The answer may be stricken for the purpose of the objection. What is it?

Mr. Leist: While Mr. Coffin may be an expert, he is not qualified as one on this record.

Mr. Weston: If the Court please—have you ruled?

The Court: No. You better lay a little more foundation. I will sustain the objection at this point.

Mr. Weston: I appreciate the general rule, however, in this type of case, which is peculiar, you will recall in the testimony from Mr. Leist's questioning, he asked everyone whether it was a retail store or what it was. Under the law—

The Court: I understand.

Mr. Weston: —anyone in the industry can testify what they consider it and he is in the industry.

The Court: Has he testified that he has been in the industry ever since the sheet metal works was founded?

Mr. Weston: Yes.

The Court: The one in Boise?

Mr. Weston: Yes.

[fol. 71] The Court: Find out what his connection was as far as finding out what the industry is.

By Mr. Weston:

Q. Are you familiar with the sales in the industry by the manufacturers; are you familiar with that?

A. To this extent: I am familiar with the type of transactions.

Q. Are you familiar with the transactions in the wholesale division of the industry?

A. No.

Mr. Leist: Your Honor, Mr. Weston, I am not trying--I want to point out—what industry?

Mr. Weston: Sheet metal and tin.

Mr. Leist: Sheet metal and tin industry?

The Court: Go ahead.

By Mr. Weston:

Q. Are you familiar with the evolution or the change from the old tin shop to the present shop which you have described?

A. Here in southern Idaho, yes.

Q. Describe that for us, briefly.

A. These early tin shops, back at the turn of the Century —1900—and two or three years before and after that date were strictly custom institutions and all of them that I knew about in southern Idaho were located in retail [fol. 72] hardware stores and they did a retail business for the customers that came in with the specifications for the job they wanted. Since that date large factories that turn out goods on a production basis have taken over a considerable portion of the products that the tin shops made, but the factories have left unsupplied a field of articles that are not standard or capable of being manufactured on an economical basis, and that hiatus in the sheet metal production is what has made possible the building up and the existence of the custom sheet metal shops today. They use the same type of machinery—sometimes larger—and the men are called tinners and always have been, and they produce articles that the factories don't make and you can't buy them anywhere else, you have to go to one of the little shops to get them made, and in that respect they are the same as the tin shops of sixty or seventy years ago.

Q. Did I understand you to say that traditionally these shops were in the hardware stores?

A. Yes.

Q. But they have broken away and they are on their own, and the hardware store is on its own?

A. Yes.

Q. With that background, are you familiar with the—let [fol. 73] me put it this way: Do you know, from your own experience and knowledge, how these shops that you have described are considered in the industry with reference to being retail?

A. Only as a matter of my own opinion.

Q. What is that opinion?

A. That they are custom retail and service establishments.

Mr. Leist: Your Honor, I object again on the ground that Mr. Coffin who is a very fine lawyer is not an expert.

The Court: Objection overruled. He is stating his opinion for what it is worth and based on his background.

* * * * * * *

[fol. 74] Cross examination.

By Mr. Leist:

Q. Mr. Coffin, do I understand you to say that you equated the business done by this defendant as that done by the tin shop that was in your uncle's basement that you worked in when you were a boy?

A. I consider the business that is done in companies as by the defendant today as the outgrowth and development of the early day tin shop, and in a great extent it is the same kind of tin shop doing the same kind of work for the same kind of people.

Q. The same kind of work?

A. Yes.

Q. For the same kind of people?

A. Yes.

Q. As in your uncle's basement, is that right?

[fol. 75] A. Yes.

Q. Are there any significant differences between the defendant's operation and those?

A. There are marked differences in that it involves this type of business is immensely larger than it was sixty years ago, the type of product they turn out due to the fact they utilize sheet metal of types that was not in existence sixty years ago, and since they can use that type of material they can do jobs that the early tin shops could not do. This record here shows the production of articles larger in size and much higher in price, but the customers of the two institutions have not changed, its still just the general public that comes in with individual specifications for a particular job. To that extent they have not changed a bit.

Q. You remember about the tin shop in the basement of the hardware store?

A. Oh, yes.

Q. To your recollection was there any year when that tin shop did 79 to 86 per cent of its dollar volume of business with only five customers?

A. I wouldn't know the answer to that question. I had nothing to do with the dollar volume. I was a small boy and my father was a part owner and I was sneaking away to go and watch the tinner. I saw the customers come in, [fol. 76] I knew them, and they were people around town with a specification of something they wanted made. That I did know.

Q. Did you know whether the general manager of one of the largest potato processing companies in the United States came in and asked to have a 5,000 pound stainless steel tank made?

A. Specifically, I don't know, but I don't think he did. There were no potato plants in existence in those days.

Mr. Leist: I have no further question.

* * * * * * *

CLIFFORD P. JACKSON a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Clifford P. Jackson.

[fol. 77] Direct examination.

By Mr. Weston:

* * * * * * *

[fol. 78] Q. You serve the general public, beside the processors?

A. Yes, we do.

Q. Just give us a few of the types of customers that you serve in the general public.

A. We do a considerable amount of work for the farming people, and quite a bit for the Cassia County and the Minidoka County schools, and we do work for the dairy industry, we do work for the box industry or the container [fol. 79] industry, we do work for just the man down the street who wants a rain pipe or gutter.

Q. Farmers?

A. Yes, and any one that requires a custom sheet metal job.

Q. Do you have a stock of materials on hand that you sell to the general public?

A. Yes, we do.

Q. Is that about the same stock that Mr. Shockey described?

A. Yes, it is.

Q. Can you add anything to his statement on that?

A. Only that our stock includes several different types of materials—steel, aluminum, stainless steel, copper, and sheet metal sheets of all sizes and shapes.

Q. If I were to come into your shop to buy a piece of sheet metal, you would have it displayed that I could look at it?

A. Yes, sir.

Q. And would you cut it to my specifications?

A. Yes.

Q. And when you sell it to me, how do you figure the price?

A. I have a price book which gives me the price of the [fol. 80] material per pound or per square foot, or per sheet, whichever category you would fall in I would price it to you.

Q. Where do you purchase the sheet metal?

A. From a wholesale sheet metal supplier.

Q. And do you pay what you term a wholesale price for that?

A. That's right.

Q. And when you sell it to me you charge a retail price?

A. That is right.

Q. And is that a standard to everybody?

A. That is correct.

Q. Do you know what your establishment is considered in the industry as to being a retail establishment?

A. Yes, it is.

Q. Do you consider it a retail establishment?

A. Yes, I do.

* * * * * * *

[fol. 84] By Mr. Weston:

Q. A little further description of the establishment as to [fol. 85] its accessibility to the public.

A. You mean the product?

Q. No, the building.

A. We have a large sign that is four feet by ten feet on the highway that directs the public into our establishment. Its approximately two- or three-hundred feet off the highway behind a car lot and its identified and accessible to the public.

Q. The front door, is it big or small?

A. Its a four foot door.

Q. Is that a door—is there a door that you can drive a truck in?

A. Yes.

* * * * * * *

[fol. 88] LYNN A. LAKE a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: Lynn A. Lake.

Direct examination.

By Mr. Weston:

Q. Will you state your residence and occupation?

A. Borah Avenue West, Twin Falls, Idaho. I am branch manager and I represent the Structural Steel and Forge Company in the Twin Falls area.

Q. How long have you been engaged in your present occupation?

[fol. 89] A. Since 1951.

* * * * * * *

Q. Do you sell metal products to the defendant in this case?

A. Yes.

* * * * * * *

Q. Do you know whether or not plants like the defendant's are considered retail within the industry?

* * * * * * *

The Witness: Yes, they are.

* * * * * * *

[fol. 90] The Court: Objection overruled, he may answer.

* * * * * * *

The Witness: Yes, they are.

* * * * * * *

[fol. 91] RODERICK LAW a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Roderick Law.

Direct examination.

By Mr. Weston:

Q. Will you give us your residence and occupation?
A. 1865 Southwest Highway, Portland; salesman for the Alaska Copper and Brass Company.

* * * * * * *

Q. Do you sell products to the defendant?
A. Yes, sir.

* * * * * * *

[fol. 93] By Mr. Leist:

Q. Mr. Law, are you in that industry which takes sheet metal in its sheet form and uses the various machines to bend it into various shapes?
A. Yes, sir.
Q. You are in that industry?
A. Yes, sir, I sell pipe and fittings which are made by our shop in Seattle.

* * * * * * *

[fol. 94] Q. Do you know whether or not the defendant in this case is considered a retailer in the sheet metal industry?

The Court: You may answer "yes" or "no".
The Witness: Yes.

[fol. 95] Q. And is it considered a retail establishment?
A. We do, yes.

* * * * * * *

Cross examination.

By Mr. Leist:

Q. You do the same thing that the defendant in the case does?

A. No, its far beyond his capacity and we do production line work up there.

* * * * * * *

[fol. 97] HARRISON L. GRATHWOHL a witness called in rebuttal by the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: Harrison L. Grathwohl.

Direct examination.

By Mr. Leist:

Q. Mr. Grathwohl, where do you live?
[fol. 98] A. Seattle.
Q. What is your occupation?
A. I am associate professor of Marketing at the University of Washington.
Q. You have a degree?
A. Yes, Doctor.
Q. What does the Doctor stand for in your name?
A. Doctor of Business Administration.
Q. You have a specialty?
A. Yes, Marketing.
Q. Pardon?
A. Marketing as a broad field.
Q. I will ask you, sir, in the interest of saving time, if you will qualify yourself in the field so far as your education and experience in the field of marketing.
A. I received my Bachelors and Masters and Doctorate at Indiana University. I taught at Indiana University and assisted in a consulting firm and taught at Indiana State University and went to South Dakota where I was associate

professor, and then I came out to the University of Washington four years ago.

Q. And you have been constantly employed there in the [fol. 99] School of Business Administration?

A. Yes, and I have consulted for a number of firms throughout the country in industries and as diverse as trading stamps and building bricks, in advertising, and in retailing and wholesaling. I have written several monographs and books on the subject of marketing in the area of retail sales promotions, and I have a number of articles in trade publications on the subject of marketing—on a variety of subjects.

Q. How do you happen to be here?

A. I was asked by you, Mr. Leist, to appear in this Courtroom for a fee and to give my opinion on the status of the defendant in this case.

Mr. Leist: I present Doctor Grathwohl as an expert.

The Court: We will hear the questions then determine whether he may answer them or not.

By Mr. Leist:

Q. Doctor, at our first meeting several days ago, I gave you a copy of a pre-trial order which has been entered in the case. I asked you to read it, paying particular attention to Paragraph 5, the Agreed Facts, and also Paragraph 6, which states the issues of fact. Now, have you read that pre-trial order and the particular parts of it?

[fol. 100] A. Yes, I have read it carefully and I have studied it.

Q. Now, I will ask you if you have been present in the courtroom throughout the proceedings of this trial since it began at 1:30 this afternoon?

A. Yes, I have.

Q. And you have heard the testimony of Mr. Carrier, did you hear his testimony?

A. Yes, I have.

Q. And you heard the testimony of the defendants' witnesses?

A. Yes, I have.

Q. Now, Doctor, based on the facts stated in Paragraph 5 of the pre-trial order and as amplified and explained by the testimony of Mr. Carrier, I will ask you whether you have formed an opinion as to whether the sales which the defendant, the Idaho Sheet Metal Works, Inc., made to the Shelley Processing Company of the J. R. Simplot Company in 1959, and 1960 and 1961 were recognized as retail sales or services in the sheet metal fabricating industry?

Mr. Weston: This calls for a "yes" or "no" answer.

Mr. Leist: It calls for an "I have" or "have not".

[fol. 101] The Witness: I have.

By Mr. Leist:

Q. What is that opinion?

Mr. Weston: I object, if the Court please. We base the objection on the fact that this well educated Doctor has not qualified as an expert in this particular industry, to wit: the sheet metal industry. The rule, which I was about to find is that, it is true, they can use experts but in my opinion that refers to the industry which is in issue in this case. This man has testified that he has had experience in teaching and study, and he has written books, and has experience in the trading stamps business, and one other but he is not qualified as to what is considered a retail establishment in this industry. We object, it would be misleading.

The Court: He did not answer the question. He asked whether the sales were retail sales; he didn't ask if it was a retail establishment, I believe that is the question. He said he has an opinion and he may answer. It goes to the weight of the testimony.

The Witness: What is the question?

The Court: What is your opinion?

The Witness: My opinion is that they were not retail sales.

[fol. 102] By Mr. Leist:

Q. Now, Doctor, I will ask you to go one step further and tell us what the basis of that opinion is.

A. Well, first of all, I would like to say that the tests that have to be applied are general in nature and I think that the examination of the particular situation, we have to recognize that other activities of the firm may be retail in nature but in relation to the J. R. Simplot and the Shelley Processing Company, these, in my opinion were non-retail sales and this is based on a variety of tests. One of the primary tests that is commonly used in evaluating whether a sale is retail or some other is the quantity. When a sale is made in a very large quantity or when the particular buyer consumes large amounts beyond that which would be considered as a retail type of purchase, then the quantity rule commonly used would indicate that the sale is wholesale or non-retail. The quantity, in terms of quantities or to an individual buyer is a test. This would be that the Idaho Sheet Metal Works was making a non-retail sale in this case.

The type of customer is another test. This is differentiated by the use that the customer will use the product and the type of customer, that is, sales to restaurants, bars, hotels, other retailers, or sales to manufacturers in large [fol. 103] amount or sales of building materials to customers for the construction of manufacturing or fabricating plants. They are considered non-retail sales. The buyers, from a retail establishment are generally not other businesses.

The production of goods to prior plan and specification can sometimes be used—its not a stock test. I think probably the prior specification would be more common in the manufacturing industry, manufacturers would do it more commonly for the specification order.

Credit systems—how was the sale made—what were the credit arrangements? From the testimony it was rather difficult to come out with anything that was outstanding in evaluating, except that it is fairly common in the manufacturing industries, for the commercial type of building where you have payments over time, that is at certain times—that is periodic—

Mr. Weston: Doctor, I don't know how that has anything to do with the industry. I am going to object. I don't think that it is relevant of what happened in another industry. We are pressed for time and I wanted to cross-examine.

The Court: He was trying to explain how he arrived at the conclusion. I don't like to stop him. You may continue. [fol. 104] The Witness: Price is another method of evaluating, and the fact that there is a price differentation would be a case there is a non-retail type of sale. However, the fact that a seller offers the same price to all buyers does not necessarily indicate that the sale is a retail sale. The test can be used only to distinguish a wholesaler or manufacturer not a retailer per se.

They were the tests and in almost every case where there was a method of arriving at a conclusion, the conclusion had to be that the sales were not retail sales.

By Mr. Leist:

Q. Doctor, let me ask you this: as you know, the equipment which the defendant made for Shelley and J. R. Simplot was intended for a so-called business use or business purpose; that is, Shelley and Simplot intended to use it to make goods which they would sell at a profit. What part, if any, would this play in formulating the opinion that you just gave?

A. It was a factor but not a decisive factor. I don't think you would find an authority in the field of marketing that would disregard the test, and this was one of the several that I used.

Q. I have one further question. Again, based on the facts [fol. 105] stated in Paragraph 5 of the pre-trial order as amplified by the testimony of Mr. Carrier, I would appreciate it, would you say if you have formed an opinion as to whether the establishment that the defendant operated in Burley, Idaho, is recognized as a retail establishment in the sheet metal fabricating industry.

A. I have.

Q. What is that opinion?

A. It is definitely not a retail establishment.

Q. What is the basis—

Mr. Weston: Its repetitious. He has answered this—withdraw the objection.

The Witness: Should I answer?

The Court: Yes, you may.

The Witness: Again, I think there is no question that a certain portion of the sales made by the establishment would be classified as retail sales. However, in attempting to arrive at a conclusion of whether the establishment was retail or something else. The general rule is what is the predominant activity—is it retail or some other type of operation, so that this has to be again the criterion. We can look at the traditional concept of retailing which would take us back to the corner drug store or bakery. We think of [fol. 106] the over the counter sales which represent the predominant sales, or the door-to-door or mail order, but this does not appear to be the type of business that the establishment is in. Its not traditional. This is one test.

The other is the utility created. That is, what utility does the firm create? A retail establishment creates time, place and position utility. Manufacturing establishments are noted for the recreation of form utility. That is the prime consideration we have to make. Where the retailers recreate a form utility, as in the case of a bakery, it is secondary or incidental to selling. Retailers are noted primarily for buying and selling. Manufacturers exist for the purpose of giving a useful form. Applying the utility created, it seems that the firm is doing more in changing form and creating a form utility.

And the value added concept is another test. Sometimes that is used in conjunction with the cost of goods sold approach. In the case of a retailer it is valid, that is the additional value that is added to the product in passing through his hands from the time that he receives it as a raw material until he sells it—its the value added. In the case of a retailer, we have a relatively low value; in the case of a manu- [fol. 107] facturer, we have a rather higher value added,

that is, the retailer buys merchandise and he resells; the cost of goods sold subtracted from the selling price gives his margin. Take a super market, 20 per cent; or other types of retail added, the sales price is 30, or 35 to 40 per cent. In the manufacturing establishment we have much more in the way of input in the way of labor and machinery application so that he buys raw materials, the cost of goods sold, and that is a smaller portion of the selling price—it might be commonly under fifty per cent, whereas the retailer commonly has over fifty per cent on the cost of goods sold. When applying this test from the testimony, particularly, I believe they said that the amount of labor was the largest portion of the sale. This would indicate that it is a non-retailing operation, probably in the category of a manufacturer.

The distribution of sales, the concentration among customers is another test. Most of the retail establishments will have a sales pattern to many customers, not a concentration that is high, and in the case of this firm. According to my figures, in 1959 the Idaho Sheet Metal Works sold 67 per cent to one customer, and 75 per cent to five customers; and in 1960, 73 per cent went to two customers and 86 per [fol. 108] cent went to five. This is a concentration that is common in manufacturing—this is common in the larger industry manufacturing, not as common in the retailing industry.

The employees, another test, how are your employees distributed? Retailers are engaged more in buying and selling and manufacturers and others are engaged more in other activities. Looking at the firm and the information I was able to glean, it seems most of the employee force was to the fabrication or the production for the creation of a form utility from the product. Retailers generally have relatively high proportions of selling employees.

The place of business and the facilities is another test. The retailers business is for selling and not manufacturing, or producing, or other activity. This is common.

The credit system, over all, which is a test, I was not able to do anything with, is a system that might be employed to

see the difference that might occur in the retail versus the mercantile.

Another test which I consider good is the standard industrial classification code. This is arrived at by a variety of Governmental branches outside of the Department of Labor, as well as a group of industry representatives—[fol. 109] experts and informed sources in the general area—Dun and Bradstreet and known bureaus of research, and McGraw-Hill and trade associations. The purpose, then they set up the classifications is to conform to the existing structure of the industry and classify the firm or the operation according to the major activities. Now, the standard industry classification, as in the Idaho Industrial Directory in 1960 and 1961 for the firm, and this is the Idaho State Chamber of Commerce, using the census, listed the Idaho Sheet Metal Works as manufacturers, processors, etc.; and they gave the standard industrial code as 3444. This, the major grouping of 34 was for manufacturers, processors and manufacturing industries, and the secondary function was fabricated metal products and fabricated structural products, involving sheet metal work. They classified it as a manufacturing industry.

Mr. Weston: What the State Chamber of Commerce said is not relevant. Section—

The Court: If you are making an objection, it will be sustained.

Mr. Weston: The question is what are they considered in the industry, not what the State Chamber of Commerce says.

[fol. 110] The Witness: I was attempting the standard industrial classification which is an industry opinion because its classification—

The Court: How much longer is the testimony going to take? If it is going to take much longer we will recess until tomorrow morning. There is still cross-examination. You said that it would be about fifteen minutes.

Mr. Leist: Doctor, could you shorten it?

The Court: I don't want to shorten the value of his testimony.

The Witness: Well, there are several other tests which probably are not as significant as the ones I have applied here. I will conclude by saying that the general orientation of the firm does not seem to be one similar to retailing and it is not concerned with selling or display, or stock turnover—inventory turned over—which is common in retailing. This does not mean that all firms have to conform to the test. In all of the tests I have applied, it is that the predominant business is not retailing. Predominantly it is selling industrial goods to industrial buyers, and they are manufacturers.

Mr. Leist: That is all. I have no further questions.

[fol. 111] The Court: You may cross-examine.

Cross examination.

By Mr. Weston:

Q. Are you familiar, Doctor Grathwohl, I believe you have based most of your testimony on the reading of the pre-trial order; is that correct?

A. My opinion has been based on this, plus the testimony in court today.

Q. You did hear the testimony in the court today?

A. Yes.

Q. And did it alter your opinion from the reading of the pre-trial order?

A. No.

Q. Are you familiar with Section 13(a) of the law?

A. Yes.

Q. And that provides that a sale shall be considered retail—shall not be considered retail if it is for resale, and they rely upon the opinion of the industry with reference to whether it is retail or not; is that correct?

A. In the industry is the quotation. Yes.

Q. You heard the testimony of Mr. Law and Mr. Lake?

[fol. 112] A. I did.

Q. And of Mr. Coffin and Mr. Shockey?

A. I did.

Q. Coming to Mr. Coffin's where he stated that the establishments are evolutions or the transfiguration of old tin shop; did you hear that testimony?

A. I did.

Q. Did you agree with that?

A. I did. I suspect that the tin shop, however, was in the bottom of the hardware store. I would say that is different than we have today.

Q. Would you say that the old time tin shop was a retail establishment in the hardware store?

A. Yes, probably.

Q. What did they do in the form of changing the form of the metal and selling it to the public that the defendant does not do? I am not interested in size or the number of customers.

A. What did they do that the defendant does not do?

Q. That's right.

A. I would assume that they did not do very much that the defendant did not do.

Q. Would you say if I purchased a product as a custom [fol. 113] order, that would not be a retail purchase?

A. It depends on who you are.

Q. The general public.

A. It most probably would be a retail purchase.

Q. And you heard the testimony that all of the sales to the processors and the public are on the same standard; you heard that?

A. Yes.

Q. And in your opinion, the sales to the processors come in a different category than the sales to the public?

A. Yes.

Q. And the size?

A. Yes.

Q. And the use of the product?

A. That is one.

Q. Do you know that the Administration and the Courts have ruled that the size of the order nor the type of customer has no effect on the question of the retail establish-

ment if it is considered a retail establishment within the industry?

Mr. Leist: Objection, Your Honor, he is asking for a legal opinion.

The Court: Objection sustained.

[fol. 114] By Mr. Weston:

Q. Do you know that is a ruling by the Administrator?

A. I am familiar with the area, but I do not interpret it the same as you do.

Q. In the final analysis of 13(a), isn't it how its considered in the industry?

Mr. Leist: Objection, he is asking for a legal conclusion.

The Court: Objection sustained.

By Mr. Weston:

Q. You are not familiar with the metal trades industry?

A. Not in detail.

Q. You have never worked in it?

A. No.

Q. Would you say that the statement of Mr. Lake and Mr. Law were wrong?

Mr. Leist: Objection, Your Honor.

Mr. Weston: What is the objection?

Mr. Leist: He is asking him to assess the whole line of testimony.

Mr. Weston: No, I'm not.

The Court: Objection sustained, that is for the Court to determine.

[fol. 115] Mr. Weston: My point was, I wanted to know if he is setting himself up more of an authority than the people in the industry.

The Court: Apparently he is.

By Mr. Weston:

Q. Are you familiar with Section 13(a)(4)?

A. I am.

Q. And once the establishment has the attribute of a retail establishment, they will still qualify if all of the sales are within the State of Idaho?

A. Yes.

Q. And the plant can manufacture and have the retail—

A. Yes.

Q. And the fact that you think that the operation may do manufacturing, that would not deprive it of its right to a retail establishment?

Mr. Leist: Its subject to the same objection.

The Court: Objection sustained.

Mr. Weston: He gave his opinion.

The Court: Not as to the legal aspect; he gave an opinion as to what he thinks it is, what it is under the statute is for the Court.

Mr. Weston: I will go to the question of his actual knowledge.

[fol. 116] By Mr. Weston:

Q. Do you know that you can go to a lumber yard and order enough lumber to build your own home and have them cut it and sell it to you at retail?

A. Yes.

Q. And is the lumber yard considered retail under the law?

A. Yes.

Mr. Leist: Objection, Your Honor.

Mr. Weston: I am asking him if he knows.

The Court: He has answered the question.

By Mr. Weston:

Q. Let us assume that the J. R. Simplot Company should cease operations tomorrow, or for six months, and purchase nothing from the defendant—or any of the other processors; would you then say that the establishment would revert to a retail establishment?

Mr. Leist: Objection.

The Witness: No.
The Court: He may answer.
The Witness: No.

By Mr. Weston:

Q. You do not feel they have any of the attributes of a retail establishment?
[fol. 117] A. The questions are not the same. If Simplot were to go out of business, that would leave a total volume going to the particular area, and I stated that the firm does have some attributes of a retail operation, that it makes ten percent of the sales at retail.
Q. If all of the intra-state producers mentioned in the pre-trial order were to quit ordering from the defendant, then in your opinion, would they be a retail establishment?

Mr. Leist: Object, this is purely a hypothetical statement of fact which is not going to occur.
Mr. Weston: For the simple reason that he has testified that it is because of the customers that we have lost the status as a retail establishment.
The Court: He may answer.
Mr. Leist: Do you understand the question?

By Mr. Weston:

Q. The question is: if all of the inter-state purchasers, the processors and the sugar company, and so forth, were to quit patronizing this defendant, would it be your opinion that they would be a retail establishment under this law?
A. If the majority of the sales went to the small consumer, the general public, yes.
[fol. 118] Q. And the size of the sales has nothing to do with it as stated under the law?

Mr. Leist: Objection, Your Honor.
The Court: Objection sustained.

By Mr. Weston:

Q. If I were to buy fifteen Cadillac cars, would that be retail?

Mr. Leist: Objection, Your Honor, it—

Mr. Weston: He is an expert.

Mr. Leist: You are asking him to express an—

The Court: I am making the rulings in this Court. You make the objections and no arguments. He is testing the basis of the rule that he is using to arrive at the opinion which he has. I think he is entitled to do that. He may answer.

The Witness: If you bought fifteen Cadillac cars?

By Mr. Weston:

Q. Yes.

A. That would be a retail sale unless it were a fleet purchase, and then it would not be.

Q. On what do you base the last statement?

A. You would be consuming the cars, and as a fleet or commercial user of the cars, you would be buying in larger quantities and probably in certain types of credit, and there [fol. 119] are several other tests. I am trying to apply several tests to the hypothetical question.

Q. Did you in that fleet and quantity, the sales are still considered a retail sale?

Mr. Leist: Objection.

The Court: Mr. Weston, it is not within the province of this witness to answer what the law is. I must ask you to refrain from asking legal questions. The objection is sustained.

Mr. Weston: The reason I am doing it, most of his answers encompass the bulletin.

The Court: There is a way of asking the question.

By Mr. Weston:

Q. Doctor, did you know that the question of determining whether an establishment is a retail establishment or not encompasses sales and services?

A. Yes.

Q. So that under this Section 13(a)(2), a retail establishment can have both sales and/or services; is that your understanding?

A. Yes.

Q. When you mentioned the fact in one particular period they had more labor than sales of commodity, why did you [fol. 120] draw the distinction?

A. This is a general test. You may find an exception to any test, but when you apply a variety of general tests and all of them come on one side or the other, then you must reach the conclusion that the firm is retail or not retail.

Q. You know that the dry cleaning establishments that give services is a retail establishment?

A. Yes.

Q. Another is the garage?

A. Yes.

Mr. Weston: That is all.

OFFERS IN EVIDENCE

Mr. Leist: I have no further questions. If Your Honor will allow me to make an offer of two documents in evidence our case is complete.

The Court: I don't know what you are offering.

Mr. Leist: I am offering the telephone directory of Mountain States Telephone Company for Burley, among other cities, to show the listing of the defendant in the yellow pages. They have two listings.

Mr. Weston: We object, there is not foundation for introducing the exhibit.

Mr. Leist: This is a book that certainly is reliable.

Mr. Weston: My objection goes to the question of who [fol. 121] put it in there and what was the purpose of

putting it in there. I think there should be a foundation laid.

Mr. Leist: May I ask if Mr. Weston suggests that the listing was put in for an ulterior purpose with the case in mind.

Mr. Weston: Did the manager, or one of the office girls, or Mr. Simplot; is that one of the ordinary types of advertising.

The Court: Let's do it in an orderly fashion, please. Have it marked and offer it and we will hear the objections.

The Clerk: Marked as Plaintiff's Exhibit No. 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Leist: I would call Mr. Shockey back to the stand.

The Court: Are you offering Plaintiff's Exhibit No. 1 in evidence?

Mr. Leist: Yes.

The Court: What is the objection?

Mr. Weston: There is no foundation.

The Court: Objection sustained.

Mr. Leist: May I call Mr. Shockey?

[fol. 122] The Court: Yes, you may.

Herbert J. Shockey a witness having previously testified in this cause, having been first duly sworn, was recalled for further examination, and testified as follows:

Direct examination.

By Mr. Leist:

Q. Mr. Shockey, I hand you Plaintiff's Exhibit No. 1 for identification and ask you to look at page 67 at which point there is a listing for the Idaho Sheet Metal Works in Burley; did you have anything to do with inserting that listing in this book?

A. Yes.

Q. You did?

A. Yes.

Q. Did you compose the copy there?

A. I don't know that I did the words exactly like this, but this was the general idea, to convey to people this idea, yes.

Q. I will ask you to look at one other listing on page 31 where the Idaho Sheet Metal Works is listed; did you know that was inserted in there?

A. I didn't know this was, no, but I know of the other one.

[fol. 123] Q. Is there anything incorrect about the listing on page 31?

A. No.

Q. This one?

A. Except—this one?

Q. That's right.

A. Well, it all depends on how you interpret it.

Q. Is there anything incorrect about it; tell us what it is.

A. We have confessed up today, or admitted in Court we build certain types of equipment, but not the important part of the line in the Burley shop.

Q. Is it a correct or incorrect listing?

A. This is correct.

Mr. Leist: I reoffer it.

The Witness: Everything has to be negotiated with the consumer.

Mr. Leist: I renew the offer of Plaintiff's Exhibit No. 1 for identification.

The Court: What is the purpose of this exhibit?

Mr. Leist: I want to show how they are listed.

The Court: What is the purpose?

[fol. 124] Mr. Leist: Whether it is manufacturing or what.

The Witness: Its to show—

The Court: You are not testifying now. Do you have an objection?

Mr. Weston: May I look at it?

The Court: Yes, its being offered to show how they are listed in the telephone directory. Is there any objection?

Mr. Weston: I don't think there is any objection.
The Court: It may be admitted for that purpose only.

(The document referred to was marked Plaintiff's Exhibit No. 1 and was received in evidence.)

Mr. Leist: I have one further offer.
The Clerk: Marked as Plaintiff's Exhibit No. 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Leist: This, Your Honor, is the Idaho Industrial Directory, 1960-61 Edition, published by the Idaho State Chamber of Commerce.
The Court: Are you testifying?
[fol. 125] Mr. Leist: I am reading the document, sir. It purports to be a standard publication of this organization.
The Court: Are you offering Exhibit No. 2?
Mr. Leist: I am.
Mr. Weston: Object on the ground there is no foundation.
The Court: Objection sustained.
Mr. Leist: I have no method of qualifying that, sir. I rest.
The Court: If you did, it would not prove or disprove any issue in this case.
Mr. Leist: It has the standard industrial classification.
The Court: That is no test.
Mr. Leist: This is not the Chamber of Commerce, it is the United States Department of the Census.
The Court: What they classify them does not prove a thing.
Mr. Leist: I rest.
Mr. Weston: Nothing further, Your Honor.
The Court: The court will take the matter under advisement.

[fol. 126] Reporter's Certificate to foregoing transcript (omitted in printing).

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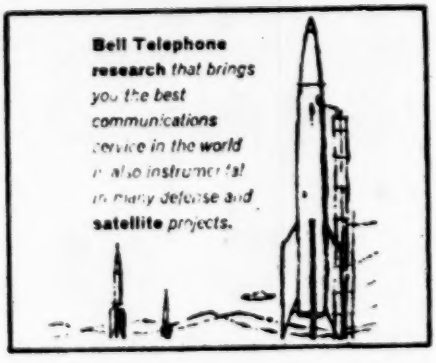

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

PLAINTIFF'S EXHIBIT No. 1